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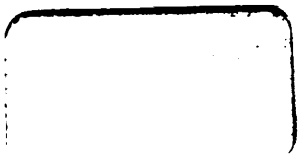

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REPORTS

OF

CASES ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES,

JANUARY TERM, 1845.

By BENJAMIN C. HOWARD,

Counselor at Law, and Reporter of the Decisions of the Supreme Court of the United States.

VOL. III.

SECOND EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS

BY

STEWART RAPALJE,

AUTHOR OF THE "FEDERAL REFERENCE DIGEST," ETC.

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SUPREME COURT OF THE UNITED STATES

HON. ROGER B. TANEY, Chief Justice.

HON. JOSEPH STORY, Associate Justice.

HON. JOHN McLEAN, Associate Justice.

HON. JAMES M. WAYNE, Associate Justice.

HON. JOHN CATRON, Associate Justice.

HON. JOHN McKINLEY, Associate Justice.

HON. PETER V. DANIEL, Associate Justice.

HON. SAMUEL NELSON, Associate Justice.

JOHN Y. MASON, Esq., Attorney-General.

WILLIAM THOMAS CARROLL, Esq., Clerk.

BENJAMIN C. HOWARD, Esq., Reporter.

ALEXANDER HUNTER, Esq., Marshal.

LIST OF ATTORNEYS

ADMITTED DECEMBER TERM, 1844.

Willis Hall,	*New York.*
George R. Davis,	*New York*
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Wm. L. Dayton,	*New Jersey.*
Jno. C. Ten Eyck,	*New Jersey*
Thos. I. Johnston,	*Mississippi.*
F. C. Treadwell,	*Maine.*
G. L. Dulany,	*Maryland.*
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LEVI D. CARPENTER,	*New York.*
REAH FRAZER,	*Pennsylvania.*
GEORGE E. HAND,	*Michigan.*
CHARLEMAGNE TOWER	*New York.*

RULES AND ORDERS.

ORDER OF COURT.

Allotment of Judges.

THERE having been an Associate Justice of this court appointed during the present term, it is ordered, that the following allotment be made, of the Chief Justice and the Associate Justices of said Court, among the Circuits, agreeably to the act of Congress in such case made and provided; and that such allotment be entered of record, viz.:

For the 1st Circuit—The honorable JOSEPH STORY.
For the 2d Circuit—The honorable SAMUEL NELSON.
For the 3d Circuit—The honorable ——— ———.
For the 4th Circuit—The honorable ROGER B. TANEY, C. J.
For the 5th Circuit—The honorable JOHN MCKINLEY.
For the 6th Circuit—The honorable JAMES M. WAYNE.
For the 7th Circuit—The honorable JOHN MCLEAN.
For the 8th Circuit—The honorable JOHN CATRON.
For the 9th Circuit—The honorable PETER V. DANIEL.

March 5th, 1845.

NOTE, by the Reporter.—The honorable SAMUEL NELSON produced his commission, and took his seat upon the bench, on the 3d of March, 1845.

ORDER OF COURT.

ORDERED, That the Court will not hear arguments on Saturday (unless for special cause it shall order to the contrary), but will devote that day to the other business of the Court; and that on Friday in each week, during the sitting of the Court, motions in cases not required by the rules of the Court to be put on the docket, shall be entitled to preference, if such motions shall be made before

the Court shall have entered on the hearing of a cause upon the docket; and the rule No. 34, adopted at February term, 1824, be and the same is hereby rescinded.

Dec. 4th.

ORDER OF COURT.

ORDERED, That no printed or written argument be hereafter received, unless the same shall be signed by an attorney or counsellor of this Court.

Dec 8th.

ORDER OF COURT.

ORDERED, That printed arguments, under the 40th rule, will be received hereafter, and at the present term, until the first Monday in February, in each and every term, while the Supreme Court continues to meet on the first Monday in December; and that the 49th rule of the Court, adopted at January term, 1842, be, and the same is hereby, rescinded.

RULES OF PRACTICE

OF THE COURTS OF THE UNITED STATES IN CAUSES OF ADMIRALTY AND MARITIME JURISDICTION ON THE INSTANCE SIDE OF THE COURT—IN PURSUANCE OF ACT OF THE 23D OF AUGUST, 1842.—CH. 188.

No mesne process shall issue from the District Court in any civil cause of admiralty and maritime jurisdiction, until the libel or libel of information shall be filed in the clerk's office, from which such process is to issue. All process shall be served by the marshal or by his deputy, or where he or they are interested, by some discreet and disinterested person appointed by the court.

II

In suits in personam, the mesne process may be by a simple warrant of arrest of the person of the defendant in the nature of a capias, or by a warrant of arrest of the person of the defendant with a clause therein, that if he cannot be found, to attach his goods and chattels to the amount sued for, or if such property cannot be found, to attach his credits and effects to the amount sued for in the hands of the garnishees named therein; or, by a simple monition in the nature of a summons to appear and answer to the suit, as the libellant shall, in his libel or information, pray for, or elect.

III.

In all suits in personam—where a simple warrant of arrest issues and is executed, the marshal may take bail with sufficient sureties from the party arrested by bond or stipulation, upon condition that he will appear in the suit and abide by all orders of the court, interlocutory or final, in the cause, and pay the money awarded by the final decree rendered there in the court to which the process is returnable or in any appellate court. And upon such bond or stipulation, summary process of execution may and shall be issued against the principal and sureties by the court to which such pro-

cess is returnable to enforce the final decree so rendered, or upon appeal, by the appellate court.

IV.

In all suits in personam, where goods and chattels, or credits and effects are attached under such warrant authorizing the same, the attachment may be dissolved by order of the court to which the same warrant is returnable, upon the defendant, whose property is so attached, giving a bond or stipulation with sufficient sureties to abide by all orders, interlocutory or final, of the court, and pay the amount awarded by the final decree rendered in the court to which the process is returnable, or in any appellate court; and upon such bond or stipulation, summary process of execution shall and may be issued against the principal and sureties by the court to which such warrant is returnable to enforce the final decree so rendered, or upon appeal, by the appellate court.

V.

Bonds or stipulations in admiralty suits may be given and taken in open court, or at chambers, or before any commissioner of the court who is authorized by the court to take affidavits of bail, and depositions in cases pending before the court.

VI.

In all suits in personam, where bail is taken, the court may, upon motion for due cause shown, reduce the amount of the sum contained in the bond or stipulation therefor; and in all cases where a bond or stipulation is taken as bail, or upon dissolving an attachment of property as aforesaid, if either of the sureties shall become insolvent pending the suit, new sureties may be required by the order of the court to be given, upon motion and due proof thereof.

VII.

In suits in personam, no warrant of arrest, either of the person or property of the defendant, shall issue for a sum exceeding five hundred dollars, unless by the special order of the court upon affidavit or other proper proof showing the propriety thereof.

VIII.

In all suits in rem against a ship, her tackle, sails, apparel, furniture, boats, or other appurtenances, if such tackle, sails, apparel, furniture, boats or other appurtenances are in the possession or custody of any third person, the court may, after a due monition to such third person, and a hearing of the cause, if any, why the same should not be delivered over, award and decree that the same be delivered into the custody of the marshal or other proper officer, if upon the hearing the same is required by law and justice.

IX.

In all cases of seizure and in other suits and proceedings in rem, the process, unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods or other thing to be arrested, and the marshal shall thereupon arrest and take the ship, goods or other thing into his possession for safe custody; and shall cause public notice thereof and of the time assigned for the return of such process and the hearing of the cause to be given in such newspaper within the district as the District Court shall order, and if there is no newspaper published therein, then in such other public places in the district as the court shall direct.

X.

In all cases where any goods or other things are arrested, if the same are perishable, or are liable to deterioration, decay or injury by being detained in custody, pending the suit, the court may, upon the application of either party, in its discretion order the same, or so much thereof to be sold, as shall be perishable or liable to depreciation, decay or injury, and the proceeds or so much thereof as shall be a full security to satisfy in decree to be brought into court, to abide the event of the suit; or the court may, upon the application of the claimant, order a delivery thereof to him upon a due appraisement to be had under its direction, either upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation with the sureties in such sum as the court shall direct to abide by and pay the money awarded by the final decree rendered by the court or the appellate court, if any appeal intervenes, as the one or the other course shall be ordered by the court.

XI.

In like manner where any ship shall be arrested, the same may, upon the application of the claimant, be delivered to him upon a due appraisement to be had under the direction of the court, upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation with sureties as aforesaid; and if the claimant shall decline any such application, then the court may in its discretion, upon the application of either party, upon due cause shown, order a sale of such ship, and the proceeds thereof to be brought into court, or otherwise disposed of as it may deem most for the benefit of all concerned.

XII.

In all suits by material men for supplies or repairs or other necessaries for a foreign ship or for a ship in a foreign port, the libellant may proceed against the ship and freight in rem, or against the master or the owner alone in personam. And the like proceeding in rem shall apply to cases of domestic ships, where by the local

law a lien is given to material men for supplies, repairs, or other necessaries.

XIII.

In all suits for mariners' wages, the libellant may proceed against the ship, freight, and master, or against the ship and freight, or against the owner or master alone, in personam.

XIV.

In all suits for pilotage, the libellant may proceed against the ship and master, or against the ship, or against the owner alone, or the master alone, in personam.

XV.

In all suits for damage by collision the libellant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone, in personam.

XVI.

In all suits for an assault or beating on the high seas or elsewhere within the admiralty and maritime jurisdiction, the suit shall be in personam only.

XVII.

In all suits against the ship or freight founded upon a mere maritime hypothecation, either express or implied, of the master for moneys taken up in a foreign port for supplies or repairs or other necessaries for the voyage, without any claim of marine interest, the libellant may proceed either in rem or against the master or the owner alone in personam.

XVIII.

In all suits on bottomry bonds, properly so called, the suit shall be in rem only against the property hypothecated, or the proceeds of the property in whosesoever hands the same may be found, unless the master has without authority given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, or unless the owner has by his own misconduct or wrong lost or subtracted the property, in which latter cases the suit may be in personam against the wrong-doer.

XIX.

In all suits for salvage, the suit may be in rem against the property saved, or the proceeds thereof, or in personam against the party at whose request and for whose benefit the salvage service has been performed

XX.

In all petitory or possessory suits between part owners or adverse proprietors, or by the owners of a ship or the majority thereof against the master of a ship for the ascertainment of the title and delivery of the possession, or for the possession only, or by one or more part owners against the others to obtain security for the return of the ship from any voyage undertaken without their consent, or by one or more part owners against the others to obtain possession of the ship for any voyage upon giving security for the safe return thereof, the process shall be by an arrest of the ship and by a monition to the adverse party or parties to appear and make answer to the suit.

XXI.

In all cases where the decree is for the payment of money, the libellant may, at his election, have an attachment to compel the defendant to perform the decree, or a writ of execution in the nature of a capias and of a fieri facias, commanding the marshal or his deputy to levy the amount thereof of the goods and chattels of the defendant, and for want thereof to arrest his body to answer the exigency of the execution. In all other cases the decree may be enforced by an attachment to compel the defendant to perform the decree; and upon such attachment the defendant may be arrested and committed to prison until he performs the decree, or is otherwise discharged by law, or by the order of the court.

XXII.

All information and libels of information upon seizures for any breach of the revenue or navigation or other laws of the United States, shall state the place of seizure, whether it be on land or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States; and the district within which the property is brought and where it then is. The information or libel of information shall also propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture and to give notice to all persons concerned in interest to appear and show cause at the return-day of the process why the forfeiture should not be decreed.

XXIII.

All libels in instance causes, civil or maritime, shall state the nature of the cause, as for example, that it is a cause civil and maritime, of contract, or of tort or damage, or of salvage, or of possession, or otherwise, as the case may be, and if the libel be in rem, that the property is within the district; and if in personam,

the names and occupations and places of residence of the parties. The libel shall also propound and articulate in distinct articles the various allegation of facts, upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article; and it shall conclude with a prayer of the process to enforce his rights in rem, or in personam (as the case may require), and for such relief and redress as the court is competent to give in the premises. And the libellant may further require the defendant to answer on oath all interrogatories propounded by him touching all and singular the allegations in the libel at the close or conclusion thereof.

XXIV.

In all informations and libels in causes of admiralty and maritime jurisdiction, amendments in matters of form may be made at any time on motion to the court as of course. And new counts may be filed and amendments in matters of substance may be made upon motion at any time before the final decree upon such terms as the court shall impose. And where any defect of form is set down by the defendant upon special exceptions, and is allowed, the court may, in granting leave to amend, impose terms upon the libellant.

XXV.

In all cases of libels in personam, the court may in its discretion, upon the appearance of the defendant, where no bail has been taken and no attachment of property has been made to answer the exigency of the suit, require the defendant to give a stipulation with sureties in such sum as the court shall direct, to pay all costs and expenses, which shall be awarded against him in the suit upon the final adjudication thereof, or by any interlocutory order in the process of the suit.

XXVI.

In suits in rem, the party claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant, by whom or on whose behalf the claim is made, is the true and bonâ fide owner, and that no other person is the owner thereof. And where the claim is put in by an agent or consignee, he shall also make oath, that he is duly authorized thereto by the owner, or if the property be at the time of the arrest in the possession of the master of a ship, that he is the lawful bailee thereof for the owner. And upon putting in such claim, the claimant shall file a stipulation with sureties in such sum as the court shall direct, for the payment of all costs and expenses which shall be awarded against him by the final decree of the court, or upon an appeal, by the appellate court.

XXVII.

In all libels in causes of civil and maritime jurisdiction, whether

in rem or in personam, the answer of the defendant to the allegations in the libel shall be on oath or solemn affirmation; and the answer shall be full and explicit and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel; and shall also answer in like manner each interrogatory propounded at the close of the libel.

XXVIII.

The libellant may except to the sufficiency or fullness or distinctness or relevancy of the answer to the articles and interrogatories in the libel; and if the court shall adjudge the same exceptions or any of them to be good and valid, the court shall order the defendant forthwith within such time as the court shall direct, to answer the same, and may further order the defendant to pay such costs as the court shall adjudge reasonable.

XXIX.

If the defendant shall omit or refuse to make due answer to the libel upon the return-day of the process or other day assigned by the court, the court shall pronounce him to be in contumacy and default, and thereupon the libel shall be adjudged to be taken pro confesso against him, and the court shall proceed to hear the cause ex parte and adjudge therein as to law and justice shall appertain. But the court may in its discretion set aside the default, and upon the application of the defendant, admit him to make answer to the libel at any time before the final hearing and decree, upon his payment of all the costs of the suit up to the time of granting leave therefor.

XXX.

In all cases where the defendant answers, but does not answer fully and explicitly and distinctly to all the matters in any article of the libel, and exception is taken thereto by the libellant, and the exception is allowed, the court may, by attachment, compel the defendant to make further answer thereto, or may direct the matter of the exception to be taken pro confesso against the defendant to the full purport and effect of the article to which it purports to answer, and as if no answer had been put in thereto.

XXXI.

The defendant may object by his answer to answer any allegation or interrogatory contained in the libel which will expose him to any prosecution or punishment for a crime, or for any penalty or any forfeiture of his property for any penal offence.

XXXII.

The defendant shall have a right to require the personal answer

of the libellant upon oath or solemn affirmation to any interrogatories which he may at the close of his answer propound to the libellant touching any matters charged in the libel, or touching any matter of defence set up in the answer, subject to the like exception as to matters which shall expose the libellant to any prosecution or punishment or forfeiture as is provided in the 31st Rule. In default of due answer by the libellant to such interrogatories the court may adjudge the libellant to be in default and dismiss the libel, or may compel his answer in the premises by attachment, or take the subject-matter of the interrogatory pro confesso in favor of the defendant, as the court in its discretion shall deem most fit to promote public justice.

XXXIII.

Where either the libellant or the defendant is out of the country, or unable from sickness or other casualty to make an answer to any interrogatory on oath or solemn affirmation at the proper time, the court may in its discretion, in furtherance of the due administration of justice dispense therewith, or may award a commission to take the answer of the defendant when and as soon as it may be practicable.

XXXIV.

If any third person shall intervene in any cause of admiralty and maritime jurisdiction in rem, for his own interest, and he is entitled, according to the course of admiralty proceedings, to be heard for his own interest therein, he shall propound the matter in suitable allegations, to which if admitted by the court, the other party or parties in the suit may be required by order of the court to make due answer, and such further proceedings shall be had and decree rendered by the court therein as to law and justice shall appertain. But every such intervenor shall be required upon filing his allegations, to give a stipulation with sureties to abide by the final decree rendered in the cause, and to pay all such costs and expenses and damages as shall be awarded by the court upon the final decree, whether it is rendered in the original or appellate court.

XXXV.

Stipulations in admiralty and maritime suits may be taken in open court, or by the proper judge at chambers, or under his order, by any commissioner of the court, who is a standing commissioner of the court, and is now by law authorized to take affidavits of bail, and also depositions in civil causes pending in the courts of the United States.

XXXVI.

Exception may be taken to any libel, allegation or answer for surplusage, irrelevancy, impertinence or scandal, and, if upon reference to a master, the exception shall be reported to be so objec-

tionable, and allowed by the court, the matter shall be expunged at the cost and expense of the party in whose libel or answer the same is found.

XXXVII.

In cases of foreign attachment, the garnishee shall be required to answer on oath or solemn affirmation, as to the debts, credits or effects of the defendant in his hands, and to such interrogatories touching the same as may be propounded by the libellant; and if he shall refuse or neglect so to do, the court may award compulsory process in personam against him. If he admit any debts, credits or effects, the same shall be held in his hands liable to answer the exigency of the suit.

XXXVIII.

In cases of mariners' wages, or bottomry, or salvage, or other proceedings in rem, where freight, or other proceeds of property are attached to, or are bound by the suit, which are in the hands or possession of any person, the court may, upon due application by petition of the party interested, require the party charged with the possession thereof to appear and show cause, why the same should not be brought into court to answer the exigency of the suit; and if no sufficient cause be shewn, the court may order the same to be brought into court to answer the exigency of the suit, and upon failure of the party to comply with the order, may award an attachment or other compulsive process to compel obedience thereto.

XXXIX.

If in any admiralty suit, the libellant shall not appear and prosecute his suit according to the course and orders of the court, he shall be deemed in default and contumacy, and the court may, upon the application of the defendant, pronounce the suit to be deserted, and the same may be dismissed with costs.

XL.

The court may in its discretion, upon the motion of the defendant and the payment of costs, rescind the decree in any suit in which on account of his contumacy and default the matter of the libel shall have been decreed against him, and grant a rehearing thereof, at any time within ten days after the decree has been entered, the defendant submitting to such further orders and terms in the premises as the court may direct.

XLI.

All sales of property under any decree in admiralty shall be made by the marshal or his deputy or other proper officer assigned by the court, where the marshal is a party in interest, in pursuance of the orders of the court; and the proceeds thereof, when sold, shall be

forthwith paid into the registry of the court by the officer making the sale, to be disposed of by the court according to law.

XLII.

All moneys paid into the registry of the court shall be deposited in some bank designated by the court, and shall be so deposited in the name of the court, and shall not be drawn out except by a check or checks signed by a judge of the court and countersigned by the clerk, stating on whose account and for whose use it is drawn, and in what suit and out of what fund in particular it is paid. The clerk shall keep a regular book containing a memorandum and copy of all the checks so drawn and the date thereof.

XLIII.

Any person having an interest in any proceeds in the registry of the court, shall have a right by petition and summary proceeding to intervene per interesse suo, for a delivery thereof to him; and upon due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice; and if such petition or claim shall be deserted, or upon a hearing be dismissed, the court may in its discretion award costs against the petitioner in favor of the adverse party.

XLIV.

In cases where the court shall deem it expedient or necessary for the purposes of justice, the court may refer any matters arising in the progress of the suit to one or more commissioners to be appointed by the court to hear the parties and make report therein. And such commissioner or commissioners shall have and possess all the powers in the premises which are usually given to or exercised by masters in chancery in references to them, including the power to administer oaths to and examine the parties and witnesses touching the premises.

XLV.

All appeals from the District to the Circuit Court must be made while the court is sitting, or within such other period as shall be designated by the District Court by its general rules, or by an order specially made in the particular suit.

XLVI.

In all cases not provided for by the foregoing rules, the District and Circuit Courts are to regulate the practice of the said courts respectively, in such manner as they shall deem most expedient for the due administration of justice in suits in admiralty.

XLVII.

These rules shall be in force in all the Circuit and District Courts of the United States from and after the first day of September next.

It is Ordered by the Court, That the foregoing Rules be and they are adopted and promulgated as Rules for the regulation and government of the practice of the Circuit Courts and District Courts of the United States in suits in admiralty on the instance side of the courts. And that the reporter of the court do cause the same to be published in the next volume of his Reports; and that he do cause such additional copies thereof to be published as he may deem expedient for the due information of the bar and bench in the respective districts and circuits.

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THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES

AT

JANUARY TERM, 1845.

ANDREW ALDRIDGE AND OTHERS, PLAINTIFFS IN ERROR *v.* NATHANIEL F. WILLIAMS.

The act of Congress of March 2d, 1833, commonly called the Compromise Act, did not, prospectively, repeal all duties upon imports after the 30th of June, 1842.[1]

Repealing only such parts of previous acts as were inconsistent with itself, it left in force, after the 30th of June, 1842, the same duties which were levied on the 1st of June, 1842.

Duties were directed by the act of 1833 to be levied according to a home valuation, "under such regulations as may be prescribed by law." This phrase embraces all regulations lawfully existing at the time the home valuation went into operation, whether made before or after the passage of the act of 1833.

And the regulations established in the 7th and 8th sections of the act of 1832 are sufficient for the correct performance of the duty.

The regulations prescribed by the Secretary of the Treasury, under a power given to him by the 9th section of the act of 1832, are also "regulations prescribed by law."[2]

The court, in construing an act, will not consider the motives, or reasons, or opinions, expressed by individual members of Congress, in debate, but will look, if necessary, to the public history of the times in which it was passed.[3]

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[1] CITED. *United States* v. *Walker*, 22 How., 311; *Fabbri* v. *Murphy*, 5 Otto, 196.

The revenue laws as modified from time to time are always construed together. *Wilson* v. *Maxwell*, 2 Blatchf. 316; see *Thomson* v. *Maxwell*, Id., 385.

[2] CITED. *United States* v. *Hutton*, 10 Ben., 272.

[3] CITED. *United States* v. *Union Pacific R. R.*, 1 Otto, 79.

In construing an act of Congress the Supreme Court of California refused to refer to the debate of Congress, saying, "we have not felt warranted in resorting to the report or debate in Congress, upon the passage of the act of 1862, to ascertain its true meaning and construction, and we adopt the language of Mr. Chief Justice Taney, in *Aldridge* v. *Williams*." *McGarrahon* v. *Maxwell*, 28 Cal., 75; *Leese* v. *Clark*, 20 Cal., 425; *Forest* v. *For-*

Aldridge et al. v. Williams.

THIS case was brought up by writ of error, from the Circuit Court of the United States for the District of Maryland, and involved the construction of the act of Congress of March 2d, 1833, commonly called the Compromise Act. Williams was the collector of the port of Baltimore, and the plaintiffs in error were importing merchants, who sued to recover duties paid under protest.

The title of the act was "An act to modify the act of the 14th of July, 1832, and all other acts imposing duties on imports."

The 1st section provided that from and after the 31st of December, 1833, in all cases where duties shall exceed twenty per centum on the value thereof, one-tenth part of such excess
*10] shall be deducted; from and after the 31st of December, 1835, another tenth part; from *and after the 31st of December, 1837, another tenth part; from and after the 31st of December, 1839, another tenth part; from and after the 31st of December, 1841, one-half of the residue of such excess shall be deducted; and from and after the 30th of June, 1842, the other half thereof shall be deducted.

The 2d section raised the duty upon certain woolens from five to fifty per centum.

The 3d section was as follows:

"That, until the 30th day of June, 1842, the duties imposed by existing laws, as modified by this act, shall remain and continue to be collected. And from and after the day last afore-

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est, 10 Barb. (N. Y.), 46; *Regina* v. *Whittaker*, 2 Carr & K., 636.

The report of a committee to the Legislature held not to be evidence of the will of both houses of the Legislature and of the executive. *Tameling* v. *United States Freehold Land, &c. Co.*, 2 Col., 411; see *Master* v. *Lomax*, 3 Myl. & K., 32; *Cameron* v. *Cameron*, Id., 289; *Salkeld* v. *Johnson* 2 Com. B., 749, 756; *Martin* v. *Hemming*, 24 L. J. Exch., 3, 5; s. c. 18 Jur., 1002, 1004.

But the history and the circumstances under which the statute is passed will be considered. *Hall* v. *Manchester*, 39 Cal., 295.

The intention must be gathered "from the language used, comparing it, when ambiguity exists, with the laws upon the same subject, and looking, when necessary, to the public history of the times in which it was passed." *Burton* v. *Burton*, 26 How. (N. Y.), Pr. 474; s. c. 3 Am. L. Reg. (N. S.), 425; *Wilkinson* v. *Leland*, 2 Pet., 627; *The Pauliner* v. *United States*, 7 Cranch, 52; *Barnes* v. *Mobile*, 19 Ala., 707; *People* v. *Utica Ins Co.*, 15 Johns. (N. Y.), 358, 380; *Horton* v. *Mobile*, 43 Ala., 598, 604; *Coleman* v. *Dobbins*, 8 Ind., 156; *Southwark Bank* v. *Commonwealth*, 26 Pa. St., 446; *Rex* v. *Hodnett*, 1 T. R., 96; *Greer* v. *State*, 54 Miss., 378; *Henry* v. *Tilson*, 17 Vt., 479; *Sibley* v. *Smith*, 2 Mich., 486.

"If a statute is not clearly worded, its parliamentary history is 'wisely inadmissible' to explain it." *Regina* v. *Hertford College*, 3 Q. B. D., 693, 707; *Barbot* v. *Allen*, 7 Exch., 609; *Rex* v. *London Dock*, 5 Ad. & E., 163.

Nor will the court look to amendments and alterations made in the committee. *Donegall* v. *Layard*, 8 H. L. Cas., 460, 465, 472, 473; *Attorney-General* v. *Sillem*, 2 Hurlst. & C., 431, 521.

said, all duties upon imports shall be collected in ready money; and all credits, now allowed by law, in the payment of duties, shall be, and hereby are, abolished; and such duties shall be laid for the purpose of raising such revenue as may be necessary to an economical administration of the government; and from and after the day last aforesaid, the duties required to be paid by law on goods, wares, and merchandise, shall be assessed upon the value thereof at the port where the same shall be entered, under such regulations as may be prescribed by law."

The 4th section exempted certain articles from duty during the interval between the 31st of December, 1833, and the 30th of June, 1842.

The 5th section exempted certain articles from duty after the 30th of June, 1842, and concluded as follows: "And all imports on which the first section of this act may operate, and all articles now admitted to entry free from duty, or paying a less rate of duty than twenty per centum, ad valorem, before the said 30th day of June, 1842, from and after that day may be admitted to entry, subject to such duty, not exceeding twenty per centum, ad valorem, as shall be provided for by law."

The 6th and last section was as follows:

"That so much of the act of the 14th of July, 1832, or of any other act as is inconsistent with this act, shall be, and the same is hereby repealed: Provided, That nothing herein contained shall be so construed as to prevent the passage, prior or subsequent to the said 30th day of June, 1842, of any act or acts, from time to time, that may be necessary to detect, prevent, or punish evasions of the duties on imports imposed by law, nor to prevent the passage of any act prior to the 30th day of June, 1842, in the contingency either of excess or deficiency of revenue, altering the rates of duties on articles which, by the aforesaid act of 14th of July, 1832, are subject to a less rate of duty than twenty per centum, ad valorem, in such manner as not to exceed that rate, and so as to adjust the revenue to either of the said contingencies."

The statement of facts agreed upon in the court below was as follows:—

*"In this case it is admitted that, on the 20th August, [*11
1842, the plaintiffs in this cause imported into the port of Baltimore, from Liverpool, in England, a large quantity of goods, wares, and merchandise, and on the same day entered the same at the custom-house in the port of Baltimore; that the following is a true entry and list of said goods, their equality, character and value.

(Here followed a list of the goods, with their value, amounting to £8254 16*s.*)

Adjustment.

Value at Baltimore per appraisement - - -	$44,346 00
20 per cent.—am't duties paid collector under protest	8,869 00
Value per invoice, £ str. 8254 16 0, or - -	$36,651 00
20 per cent. - - - - - - - - -	7,330 20
Duty per home valuation - - - - - -	$ 8,869 20
Per invoice value - - - - - - - -	7,330 20
	$ 1,539 00

"That, on their entry, the defendant exacted and required of the plaintiffs to pay, as and for duties on said goods, the sum of eight thousand eight hundred and sixty-nine dollars and two cents, which the plaintiffs first refused to pay, but not being able to get their goods without paying the same, they did pay the same under protest; that the value of the goods, by the true invoice cost, adding freight and other charges, was thirty-six thousand six hundred and fifty-one dollars, ($36,651;) that the home valuation in Baltimore, as fixed by the appraisers, was forty-four thousand three hundred and forty-six dollars, ($44,346;) that the duties upon the invoice cost and charges would have been seven thousand three hundred and thirty dollars and twenty cents ($7,330.20).

"It is further agreed, that the duties, so collected as aforesaid by the defendant, were exacted under, and in pursuance of, orders and regulations from the Treasury Department of the government of the United States, and with the approbation, and sanction, and direction of the President of the United States.

"And it is also admitted, that the amount exacted as aforesaid by defendant of plaintiffs, and by them paid him as aforesaid, was deposited by the defendant in the Merchants' Bank of Baltimore, to the credit of the Treasurer of the United States, on the 29th August, 1842.

"It is also agreed, that the court may infer, from the facts hereinbefore agreed upon, whatever a jury might infer.

"If, upon the foregoing statement of facts, the court shall be of opinion that the plaintiffs are entitled to recover the above
*12] sum of eight thousand eight hundred and sixty-nine dollars and twenty *cents, ($8,869 20) or any part thereof, then judgment to be entered for the plaintiffs, for the amount

so determined to be due, with interest; if they should be of opinion that the plaintiffs are not entitled to recover at all, then judgment to be entered for defendant.

"It is further agreed, that this court enter up a judgment upon the aforegoing case stated, for the defendant, and that the plaintiffs be at liberty to appeal, or prosecute a writ of error to the like effect and purport, as if the above facts were stated in a bill of exceptions, and judgment rendered upon them for the defendant.

"And it is further agreed, that either party shall be at liberty, in the Supreme Court, to raise and argue, in that court, any points or questions which, it may appear to that court, could be raised upon the aforegoing facts.

REVERDY JOHNSON, *for plaintiffs*,
Z. COLLINS LEE, *U. S. Attorney.*"

29*th November*, 1842.

The court below gave judgment for the defendant, and a writ of error brought the proceedings up to this court.

R. Johnson, for the plaintiffs in error.
Nelson, attorney-general, for the defendant.

R. Johnson made three points.

1. That when the duties were exacted of the plaintiff by the defendant, there was no law imposing any duties upon such an importation.

2. That if there was, there was no law authorizing their being levied on the home valuation, and that the plaintiff is entitled to recover the difference stated in the record of $1539.

3. That if such duties were in whole, or in part, exacted without law, the amount may be recovered in an action for money had and received, upon the facts of this case.

He said that the judgment below was *pro forma*, and the question raised by the first point was now for the first time brought before any court. The amount in all the cases is about a million and a half. Before 1842, all duties were levied upon foreign valuation. There are two constructions of the Constitution; one, that under it, there is a power to collect revenue for the sake of the revenue only; the other, for protection. The act of 1833 was a compromise between these two. Each class was supposed to surrender something. The law was intended to terminate at a certain period, viz., 30th June, 1842, and the question is, what was the condition of the revenue-system after that day. Was there any law to impose duties? We say not. From the history of the act and the

act itself, we infer, that it was the intention of its framers to leave the subject wholly to Congress after 1842. The former
*13] attorney-general decided otherwise, and gave two opinions; but, upon examining them, we do not *find that clearness of conviction which he always had when clearness was attainable. He evidently doubted upon the subject. The Secretary of the Treasury differed from him in opinion. The Committee of the House of Representatives reported unanimously that there was no authority to collect duties at all after the 30th of June, 1842. What is the construction of the act, taken by itself, apart from its history? The title is, "An act to modify," &c., showing an intention to change the entire system, and make it just what this law would leave it, as if all other acts were specially repealed. The first two sections provide for the period anterior to June, 1842, without saying what shall be done afterwards; the third says, that, until that day, other laws, as modified by this act, shall continue in force. Congress, therefore, was not content with leaving the collection of duties as a matter of inference, but gave an explicit direction that they should be collected, showing its opinion to be that unless there was an express authority granted to the executive power to collect the modified duty, that branch of the government would not have it all. The remainder of the section applies to a time after June, 1842, and says that credits shall be abolished. But upon what is the payment to be calculated, or how much is it to be? This part of the act is silent. "Duties shall be laid only sufficient for an economical administration of the government." But the amount wanted from year to year can only be determined when the year comes, and could not be foreseen in 1833. There is a constant reference in the act to the discretion of future Congresses. Who was always to decide upon the amount which would be consistent with an economical administration? Not the executive, nor the judiciary, but the framers of the law well knew that Congress alone could settle the annually recurring question. What might be economy at one time, might not at another. The act says "such duties shall be laid, &c.," using prospective terms. Again, the phrase "duties required to be paid by law," implies that the law is to be passed thereafter. So, the phrase, "shall be assessed, &c., under such regulations as may be prescribed by law." The object of the law is quite apparent. It was to give quiet to the country for nine years, and then the government was to go on under an economical administration, the amount of expenditure being settled by the then Congress. The only mode of assessing the duties then known, was to

take the foreign valuation; but frauds were practised under that method, and in order further to protect domestic industry, a home valuation was substituted. But as this would be different in the respective cities, the mode of producing uniformity was left to the legislative and not the executive power.

The 4th section enlarges the list of free articles.

The 5th provides also for free articles, and then says that "all imports, &c., may be admitted at such duty as shall be provided for by law." Why was that clause put in? The previous part of the *law substitutes cash for credit, and home for foreign valuation. Supposing these to be positive enactments, what does the clause in question enact? No one knew better than the framers of the law that it contained nothing which could be enforced by the judiciary. But it was a time when all parties united for great objects, and though they knew that it would be idle to attempt to trammel and tie up future Congresses, yet they could chalk out a broad line, and rely upon the same patriotism which animated them, for its being followed out. The limit was, that only such an amount of revenue should be raised as was necessary for an economical administration of the government, and the duties were to be collected "under such regulations as may be prescribed by law." Could they suppose, when they used this language, that the regulations already existed upon the statute-book? In the latter part of this section it is said, that importations may be admitted upon such duties not exceeding twenty per cent. "as may be provided by law." What does the government say? That twenty per cent. must be paid, and the discretion as to a lesser amount is gone. The result of the argument will be, that the free articles must pay twenty per cent. also, because the government says this is the duty. If there was any duty at all after June, 1842, the executive must deduce his right to collect it from the 5th section, for no preceding section fixes the amount. But the 5th section includes more articles than those paying upwards of twenty per cent., and there is no process of reasoning by which one class can be taken out and the other left. How, then, are free articles to get in? The act shows that it was to be done by subsequent legislation. But if any articles can be considered as free, by the operation of the act itself, the same reading will include protected articles, and bring them in free also. The words "as shall be provided for by law" ride over the whole section. If the attorney-general supposes that these words mean such regulations as the executive might make under prior laws, it appears to me that he confounds the mode [*14

of assessing the duty with the power to assess it. The opinion of the late attorney-general takes this ground. Suppose there was a prior law giving to the Treasury Department the power of making regulations for the collection of the tax; this only reaches one of the two things that must be done, viz., 1st, a tax is to be imposed, and, 2d, the mode of collecting it is to be pointed out. But a power to carry out the second branch of the proposition does not give to the executive an authority to name the amount of the tax nor the articles upon which it shall be levied. The imposition of a tax is a high exercise of legislative power, and Congress could not vest the executive with it. The act states twenty per cent. as a maximum, but, within that, there is a discretion to be exercised by Congress. There are three classes of articles recognised in the bill; one paying more than twenty per cent. duty, one less, and the third entirely free. Are all these to be *15] taxed *equally with twenty per cent.? If so, the language of the 1st section would have been different from what it is.

2. As to the history of the act, derived from the Journal of the Senate and Register of Debates.

The 3d section now has the "domestic valuation under regulations to be prescribed by law." It was so in the original bill. 9 vol. Reg. Deb. part 1, pages 711—713.

Mr. Dickinson proposed to strike out "by law," and insert "the Secretary of the Treasury, with the approbation of the President." Mr. Clay said, "leave it to a future Congress to legislate on the subject of the amendment." He "doubted the constitutional power to leave it to the executive;" and again, "he would not give them the power, for if they were opposed to protection," &c.

The amendment was rejected by nearly an unanimous vote. This court has a right to look at the history of the bill. In the discussion of the power to create a Bank of the United States, the history of the country has constantly been referred to; and so, with regard to the power of states to make insolvent laws. If the executive had the power now contended for, it is because Congress failed to keep it away when it intended so to do. If the ground had been taken during the discussion of the bill, which is now assumed on the part of the government, would the Senate have acted as they did?

2d point. If we are not entitled to the whole, we are to the difference between the home and foreign valuation. Suppose the twenty per cent. duty is to stand; if Congress were to regulate the mode of assessment, and there is no law pointing out the manner of adopting the home valuation, the invoice

must be the guide. The Secretary of the Treasury issued two different regulations. 1. That the appraisers should ascertain the current market value of the articles, and charge twenty per cent. upon it. This, of course, included the first cost, duty, charges, and profit. All these enter into the cash value, and a duty upon the aggregate compelled the importer to pay a duty upon the very duty itself. 2. The Secretary directed that the amount of duty should be deducted from the aggregate, and twenty per cent. charged upon the residue. This plan might or might not have been just to the government. The Secretary seems to have found so much difficulty in supplying the want of legislation, that this court can scarcely feel itself warranted in saying that legislation existed.

3d point. It is contended by the other side, that, even allowing that this money was improperly exacted, an action for money had and received will not lie against the collector. The record says that the plaintiffs could not get their goods without paying, and did accordingly pay, under a protest. This protest was notice to the collector not to pay over to the Treasury. That he was bound to pay over, begs the whole question; because, if the government had no right to exact it, the collector was only an ordinary agent, and bound by the same rules. The suit was brought on the day after the money *was paid over, and this circumstance is thought [*16 by the opposite counsel to make a difference, and to free the collector from responsibility. But if the pendency of a suit would protect the collector, the existence of a notice would do the same thing. An action for "money had and received" is the proper one in all cases like this. If the other side are right, all that the collector has to do is to pay over the money immediately to the Treasury, and we must then fight it out with the government. But this is not the intention of the law. The moment that the collector received our money, our right of action commenced, and nothing that he can do can divest us of the right which has accrued.

Nelson, attorney-general, for defendant, made the two following points:

1. That the amount of duties as aforesaid, paid by the plaintiffs in error, upon the goods, wares, and merchandise imported by them into the port of Baltimore, was properly demanded by the defendant in error, under the provisions of the act of the 2d of March, 1833, entitled "An act to modify the act of the 14th of July, one thousand eight hundred and thirty-two, and all other acts imposing duties on imports."

2. That even assuming the same to have been demanded

without authority of law, the action for money had and received, instituted by the plaintiffs against the defendant in error in the court below, was not maintainable.

The first proposition involves two inquiries:

1st. Whether any duties were collectable under the act of the 2d of March, 1833?

2d. If so collectable, by what rule were they to be ascertained and assessed?

1st. It is admitted that prior to the act of March, 1833, the goods in question were subject to a duty of more than twenty per cent., by virtue of the act of 14th July, 1832, to be assessed according to the rules prescribed by that act. The question then is, how far have the provisions of the act of 1832 been changed by that of 1833? All are familiar with the nature and cause of the Compromise Act. It bears upon its face marks of a friendly spirit between the advocates of two very different classes of opinions. As a statute, it is singularly constructed. It states political propositions, promises money, prohibits money, but enacts few things. But the only question before us is, to what extent has it changed the law of 1832? It consists of six sections, the 2d and 4th of which are not material to the present inquiry.

The 1st section carries out the purpose indicated in the preamble, and provides that from and after the 30th of June, 1842, a duty of twenty per cent. is to be collected upon all *17] goods imported into the United States, and embraced within its terms. It deals only with the *excess above twenty per cent., and provides for its gradual diminution; but the duty, then existing, of twenty per cent., is no where repealed. Reducing it to twenty is not repealing the twenty. The section is therefore equivalent to a fresh and positive enactment that a duty of twenty per cent. should be collected after June, 1842. But it is thought that this effect of the 1st section is controlled by the subsequent sections. Let us examine them seriatim.

The 3d contains five distinct propositions, viz.:

1. That until the 30th day of June, 1842, the duties imposed by the 1st section shall remain and continue to be collected.

2. That all duties thereafter shall be collected in ready money, and all credits abolished.

3. That all duties shall be laid for the purpose of raising revenue necessary to an economical administration of the government.

4. That a home valuation shall be adopted.

5. That the regulations for the assessment shall be provided by law.

It is said that the first of these propositions limits the duration of the act to 30th June, 1842, and then repeals it. But it is merely declaratory of the existing law, and provides that the mode and manner of collecting the duties should continue the same until June, 1842, when a new mode and manner of collection was to be pursued. It does not repeal the 1st section either expressly or by implication; because, if such had been the intention of the legislature, the expressions used would have been co-extensive with those of the 1st section; and the language of the 1st section provides for the state of things *after* June, 1842, whereas that of the clause which is said to repeal it, stops short at that day. Besides, the provision is merely affirmative in regard to the act of 1832, which was in its terms a perpetual act. An affirmative provision never repeals, where a permanent law is re-enacted for a time. T. Raym. 397.

2d proposition. This clause is operative by the mere force of its terms—*proprio vigore*. It establishes the system of cash, and abolishes credit duties, but the duties upon which it is to operate are those provided for in the 1st and 2d sections. It does not profess to change them in amount, but merely the mode in which they shall be paid; and can be read in connection with the 1st section so as to be perfectly consistent with it, except that it repeals the credit system.

3d proposition. This is a mere declaration or promise of what should be done by future legislatures—of itself inoperative. It varies no duty; abolishes none; establishes none. It therefore leaves the 1st section in full operation.

4th proposition. This establishes a principle and enacts a law, viz.: that the duty shall be calculated on the value of the goods at the place of importation, after 30th of June, 1842. Its effect is to repeal the mode of ascertainment provided in the act of 1832. It was a strong provision for the protection of home industry, and jeoparded *the bill. But [*18
does it repeal the 1st section? Or does it not rather recognize the continued existence of the duties laid in that section? The duties are to be collected in cash. What duties? Not those thereafter to be laid, but those then imposed.

5th proposition. This points to the mode in which such home valuation shall be established, by directing that the "regulations shall be prescribed by law." It is said that the existence of these regulations is a pre-requisite to the power of collecting. Assuming this to be so, what would be the legal effect? Only to leave the duties to be ascertained

as they were by the act of 1832. If this clause should become inoperative by legislative omission, it cannot repeal the other provisions of the act. This will be considered more particularly hereafter. The result is, that the third section of the act, when analyzed into its five propositions, modified the act of 1832 in but two particulars, viz.: by introducing cash duties and a home valuation.

The 4th section, as has already been stated, can have no bearing upon the question, as it is temporary in its character.

Let us proceed to the 5th section of the act. Does it repeal the 1st section? It provides only that Congress may reduce the whole duties below twenty per cent., in case there should be a redundancy of money in the treasury, or raise them to twenty upon free articles, in case there should be a deficiency. How is this inconsistent with the 1st section? It made no change in it, but only reserves a power which existed without such reservation. We must harmonize these sections, if possible. The rule which requires us to do so is so well known that it is useless to cite authorities in support of it. A reservation of power to legislate is not legislation. It would be extraordinary that in a case of mutual concession, all duties should be repealed, and the manufacturing interest left without any protection at all.

The 6th section provides "that so much of the act of 1832, or of any other act, as is inconsistent with this act, is hereby repealed."

The rate of duties differing from the act of 1833; the credit on duties; the duties on articles made free by the act of 1833, are inconsistent with this act, and necessarily repealed by it. But the provisions of the act which merely contemplate future legislation, and yet enact nothing in themselves, such as that "duties shall be laid for the purpose of raising necessary revenue only;" that goods paying less than twenty per cent. ad valorem, may be admitted at such duty, not exceeding twenty per cent., as may be provided by law;" that "the duties shall be assessed upon the value thereof at the port of entry, under such regulations as may be prescribed by law," (under the assumption before stated,) are inconsistent with no previously existing law.

A promise to pass a law to change the rate of duty, is not inconsistent with an existing law, so as to repeal it before the promise is executed. The future legislation contem-
*19] plated has not been had; *the only thing done is by the act of the 11th of September, 1841, which provided that all articles imported after the 30th of September, 1841, which

paid less than twenty per cent. or came free, should be subject to a duty of twenty per cent., with certain exceptions.

Let us now return to the consideration of the fourth proposition of the 3d section, respecting the home valuation, and inquire whether the power to collect duties upon it did not exist under the acts of 1832 and 1833, notwithstanding the omission of Congress to legislate as to regulations.

Omitting the qualification of the clause, was it not susceptible of execution under the act of 1832?

1. The 7th section of the act of 1832 contains a principle which is as applicable to home as to foreign valuation. It directs the actual value to be appraised by the collector, and provides for duties then or thereafter imposed. Value is what a thing is worth in the market, and the law that provides for ascertaining it by the judgment of appraisers in one place, lays down a principle by which it may be ascertained everywhere.

2. By the 15th section a rule of ascertainment is prescribed by adding insurance.

3. But supposing these sections insufficient, still the 9th section of the act vests the Secretary of the Treasury, under the direction of the President, with power to prescribe regulations, &c. Doc. 261, pp. 6, 7; Executive Doc., 27th Cong., 2d sess., vol. 5, opinion of Mr. Legaré.

But suppose that regulations by Congress were necessary, instead of being made by the Secretary. They would only be directory to govern the officers of the customs. The principle is established by the law. Regulations are not wanted to settle the rights of merchants or the amount of the tax, for the amount is fixed at twenty per cent., and this court decided in Wood's case that merchants must pay the amount of duty whether the custom-house officers acted rightly or not. The record admits that twenty per cent. was fairly paid on a home valuation. A duty thus imposed by the law becomes a personal debt. 13 Pet., 493. The government could recover the amount although the officers gave up the goods without any bond; and money thus properly paid cannot be recovered back. 1 T. R., 286.

But it has been said that the statute in question may be explained by extrinsic parol evidence of the meaning of the legislature which passed it. Now I hold, 1st, That you cannot look, in interpreting an act, beyond the terms of the act itself and the particular historical circumstances out of which it grew, and, 2d, That if you can, the evidence which has been invoked proves nothing.

As to the first proposition, see Dwarris on Statutes, 48; 15

Johns. (N. Y.), 380, 395; 2 Pet,, 662; 1 Kent Com., 461;
*20] Opinions of Attorneys-General, Mr. Wirt's opinion, 444, 445.

*If every member of the legislature had preferred that the regulations under the act of 1832 should not have been sanctioned by that of 1833, it would not have been effective to repeal the act of 1832, unless they had expressed their wish in a legislative form. But 2d, what does the debate prove? Mr. Dickinson's proposition was to strike out the paragraph respecting a future law and insert an adoption of that of 1832. Upon what principle was it rejected? Merely because Congress intended to reserve the power instead of giving it to the executive. Even supposing that you knew the meaning of the Senate, would it follow that the House of Representatives understood the law so? At page 715, Mr. Robbins proposed an amendment, that if Congress should omit to make a regulation, the law should cease; and this was rejected. Mr. Wilkins, in his speech, said that the law was not to be expounded by the declaration of any senator.

But suppose I am wrong in all this, still I say that the collector is not personally responsible. I concede that if an agent exacts money illegally, and has notice, he is liable. But there is a distinction between voluntary and involuntary payments. 10 Pet., 137; 13 Id., 267. These cases were before the act of 1839, and under them Mr. Hoyt claimed a right to retain money in his hands to meet protests. The act of 3d March, 1839, was passed to prevent this practice, and was founded upon Mr. Grundy's opinion, reported in Opinions of Attorney-General, p. 1287. This act says that moneys paid to collectors shall not be held by them, but shall be placed to the credit of the treasurer of the United States. It contains two provisions.

1. That the collector shall pay over to the treasurer.

2. It creates a remedy for the party by authorizing the Secretary of the Treasury to draw his warrant upon the treasurer for the amount to be refunded. How can an importer, since this act, bring a personal action against the collector? This action of assumpsit is founded on an implied promise. But will the law imply a promise in the face of the act of 1839, which directs all moneys, whether received properly or improperly by the collector, to be paid immediately over to the treasurer? The case in 10 Pet., 154, sanctioned the collector's retaining money if it is paid under a protest, but this was before the act of 1839. If he had given a bond not to pay it over, the bond would have been void. If then he cannot retain the

money without violating the laws, how can a promise to retain it be implied?

If an agent, acting in the execution of a duty, endorses a bill, he is not personally liable. 5 Price, 564. Nor will a suit lie against an agent who pays over. 4 Cow. (N. Y.), 456.

And a case in Wheaton carries the doctrine further still, that an officer of government is not personally responsible for torts. 3 Wheat., 246.

[*21

Johnson, in reply and conclusion.

Let us consider in the first place the point just raised, viz., that we cannot recover because the collector has paid the money over to the government. We say,

1. That there is no such general principle.
2. That the act of 1839 did not establish it.
3. That if it did, the act would be unconstitutional and void.

1. The original cases establish that where payment has been made to an agent, who has paid it over without notice, the agent is not responsible. But if there be notice, he is. 10 Pet., 154; 13 Id., 267; 3 Wheat., 246; 4 Cow. (N. Y.), 456—458; 9 Johns. (N. Y.), 201.

2. It is said, however, that the act of 1839 has changed the law in this respect. It is probable that collectors sometimes retained too much, and if so, the act was right. But it only makes a rule between the government and its officer, without interfering with the rights of the merchant. The 2d section says, "paid under protest against the rate of duty," but does not include cases in which it is alleged that there is no duty at all. If the argument on the other side be correct, there can be no suit at all against any collector, and the President has only to instruct him to seize upon any man's goods that he chooses.

3. Would such a law be constitutional?

It is unnecessary to enlarge upon the doctrines, that the government has only limited powers, and that its fundamental principle is, the sacredness of private property, which is not to be taken without law. The true construction of the act of 1839 must be, that the Secretary of the Treasury is to draw his warrant for whatever amount may be recovered against the collector, and not, that he is vested with discretionary power whether to refund or not. It would not be justice to turn a citizen over for redress to the very government which has injured him.

But, to pursue the argument,

1. Were we bound to pay any thing at all?
2. If so how much, on the home or foreign valuation?

The first point turns on the act of March, 1833, which it is desirable to construe by its own terms only, but if this is difficult, we have a right to resort to its history. The 1st section provides for reductions until June, 1842. After that time, was there any law for the collection of duties? We say not. Up to that day there can be no doubt of the existence of a duty, or that it was levied on the foreign valuation. It is true, that if the law had stopped there, the duty would have continued. But that is not all the law. It intended to provide also for a time subsequent to June, 1842, in some particulars, as for example, payment in ready money and a home valuation.

*22] The 3d section says, that until June, 1842, the duties shall remain *and be collected. If they could already be collected by existing laws, these words are superfluous. It must be read as if the words "and no longer" were inserted. After June, 1842, the act says, that only such an amount of revenue shall be raised as is necessary for an economical administration of the government. Was this a twenty per cent. duty? Who can tell? It was impossible to say, nine years in advance, what sum would be necessary. It was to be collected, too, in a different mode: a home valuation was introduced for the first time. The act of 1832 directed appraisers to ascertain the foreign valuation. It is said by the other side, that it is easy to add charges, &c., and then you ascertain the home valuation. But this is not so, because the value at home fluctuates from a variety of causes. There is a great difficulty in carrying out this principle of home valuation, because the Constitution requires duties to be uniform in all the ports. This very subject was the great objection to the Compromise Act. Ought it to have been left to the executive? It is said, that the act of 1832 had so referred it. But not so. That act only authorized the executive to guard against fraud. Knowing the difficulty of executing the duty, Congress would not have so left it. There is little or no difference between giving the executive power to impose a tax, and power to direct the mode of levying it. In fact, the Secretary of the Treasury issued three different regulations on the subject. If previous laws gave the power to the executive, why were the words inserted, "under such regulations as may be prescribed by law." Mr. Legaré says, it means, "may or may not be prescribed;" and that "may" is not imperative.

The 4th section of the act is said to have no bearing upon the present point; but I do not so consider it. It provides for free articles until June, 1842; after that time they fall back into their former class. But the section contemplates fresh legislation, when it says, that goods shall be admitted on such

terms as shall be prescribed by law. Why put this in, unless it was thought that there would be no law, unless one were passed? The last part of the 3d section ought to be read as if it were part of the 1st. If you put them together the sense is clear; and their meaning is, that there is no duty after 1842, unless by the passage of another law.

What will you do with the articles enumerated in the 4th section? After 1842, they must go back to their former class. But this would interfere with the basis of the compromise. If the other side is right, these articles must be taxed again, and, not being included within the 1st section, might be taxed more than twenty per. cent. But this was not the meaning. The compromise act was more like a treaty of peace than a law; but the parties could not see as far as 1842. One thought that free trade, and the other, protection, would by that time be the settled policy of the country, and therefore both agreed in referring the whole matter to future legislation. [*23 They intended *to lay down certain general rules, which they expected to have a commanding influence.

The 5th section was not in the bill when originally reported. Why was it put in? See Mr. Clay's speech, Reg. Deb., vol. 9, part 1, p. 463. The original bill provided, that after 1842, the duty should be twenty per cent.; but this was stricken out, and a clause inserted, that Congress should provide, &c. Temporary systems of legislation have often been adopted.

As to "regulations to be prescribed by law:"—The debates show, that a proposition was distinctly made, by Mr. Dickinson, to leave them to the executive, and rejected, because it was doubted whether it was a power appropriate to the executive. The action of the 27th Congress shows its opinion. A bill passed with much unanimity to continue duties, but failed to become a law in consequence of one controverted point. But the message of the President admitted that a law was desirable. Taxation should be clearly imposed and only by law, not by the discretion of the executive.

Ought the duty to have been levied on a home valuation?—There was no law for this, even if the 1st section continued a duty of twenty per cent. It was to be carried out under regulations to be prescribed by law, and none were prescribed. The friends of protection refused to pass the law, unless a home valuation were inserted, and they were unwilling to leave the matter to the executive, because, if hostile to protection, he might destroy it. The difference in this small invoice is $15,000.

Mr. Chief Justice TANEY delivered the opinion of the court.

This suit comes before the court upon a case stated, and is brought here by writ of error from the Circuit Court for the district of Maryland.

The case in its material circumstances is this:

On the 20th of August, 1842, the plaintiffs in error imported into the port of Baltimore, from Liverpool, certain merchandise particularly set forth in the record, which, at the port of Baltimore, was of the value of $44,346, as ascertained by appraisement at the custom-house. Upon these goods the defendant in error, who was at that time the collector, acting in pursuance of orders and regulations made by the Treasury Department under the direction of the President, demanded for duties twenty per cent. upon the value so ascertained; which amount was paid by the plaintiffs in error under protest; and this action instituted against the collector for the purpose of recovering back the money. There are some other circumstances mentioned in the case stated, but in the view which the court takes of the subject it is unnecessary to recapitulate them. The judgment of the Circuit Court was in favor of the defendant.

The great question intended to be tried is, whether, under the act of Congress of March 2, 1833, the government *24] was authorized to *collect any duties upon goods imported after the 30th of June, 1842, without the aid of further legislation by Congress?

In expounding this law, the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed.

The act in question is certainly not free from difficulty; and this difficulty arises from its peculiar character. It is commonly called the Compromise Act; and upon the face of it, it is evident that something was intended beyond the ordinary scope of legislation. Provisions are introduced in relation to the future action of Congress upon the tariff, which can only be accounted for by regarding the act as a compromise of conflicting opinions on that subject, whereby a certain scale of duties was fixed upon and established until June 30,

1842, and certain leading principles agreed upon, by which, after that time, it was proposed to regulate the action of Congress, and the latter, as well as the former, inserted in the law in the forms of legislation. That this was the case is abundantly manifested by several clauses in the act, and particularly in the 6th and last section, which provides that nothing contained in the act shall be construed to prevent the passage, prior or subsequent to the 30th of June, 1842, of laws to prevent and punish evasions of the duties imposed by law, nor to prevent the passage of any act prior to the day last mentioned, in the contingency of either excess or deficiency of the revenue, altering the rates of duties on articles which, under the act of July 14, 1832, were subject to a less rate of duty than twenty per cent., in such manner as not to exceed that rate, and so as to adjust the revenue to either of the aforesaid contingencies. Now it is impossible to suppose that Congress could have doubted its power to repeal, or modify afterwards, the duties imposed by this act, in such manner as the public exigencies might require, or its power to pass laws to secure the collection of the revenue, and to punish any one who might attempt to evade the duties imposed by an act of Congress. If there had been nothing in this law out of the ordinary course of legislative action, it would hardly have been deemed necessary to encumber it with these reservations of power, which nobody doubted, and which Congress was continually exercising upon every other subject. These provisions strongly mark its peculiar character. And this association of positive and imperative enactments, with agreements for future action, has perhaps unavoidably occasioned some obscurity, and, as to some of the clauses, made it difficult at *first sight to say whether the language was [*25 mandatory, or merely declared the principles by which it was proposed that the legislation of Congress should afterwards be governed.

Taking this view of its general character and objects, the very large sum ultimately involved in the controversy makes it the duty of the court to proceed to a closer and more careful examination of its different provisions. It is evidently supplementary to the act of July 14, 1832, and repeals only so much of that act, and of other previous acts, as are inconsistent with it. All of the duties, therefore, imposed by the act of 1832, or any other law, and all the rules and regulations provided for their collection, remain in full force, unless they are inconsistent with the act in question.

The point to be determined then is, whether, after the 30th of June, 1842, the collection of duties imposed by the act of

1832, or by any other law as modified by the act of 1833, is inconsistent with the last mentioned act. In other words, whether it repeals all previous laws imposing duties after the time above mentioned; and if it does not, whether it has failed to provide the necessary rules and regulations to enable the proper officers to collect them.

The 1st section declares that all duties above twenty per cent. ad valorem, imposed by the act of 1832, or any previous laws, shall be reduced annually, at the rate therein mentioned, until the 31st of December, 1841; and that, after that time, the one-half of the excess above twenty per cent. shall be deducted; and from and after the 30th of June, 1842, the other half shall be deducted. Here the section stops; and so far, therefore, from repealing the whole duties, it by necessary implication continues a duty of twenty per cent. after the 30th of June, 1842; for the direction to deduct the excess above that sum presupposes that a duty to that amount is imposed and to be collected. The language used is equivalent to a positive enactment, that from and after the 30th of June, 1842, the goods therein mentioned shall be charged with that duty.

The 2d section is to the same effect. For after modifying the duties imposed by the act of 1832, in regard to the articles mentioned in that section, it declares that these duties shall be liable to the same deductions as are prescribed in the 1st section—that is to say, the excess over twenty per cent. remaining on the 30th of June, 1842, is to be deducted; and consequently very clearly implying that twenty per cent. is to be charged and collected after that period.

The 3d section provides that the duties imposed by existing laws, as modified by that act, shall remain and continue to be collected until the 30th of June, 1842; that after that time all duties shall be collected in ready money; and that such duties shall be laid as are necessary to an economical administration of the government, and shall be assessed upon the value of the goods at the port where they are entered, "under such regulations as may be prescribed by law."

*26] The latter words of this section relate merely to the regulations *by which the duties were to be collected after the time specified, and that part of the controversy will be hereafter considered. The points to which our attention is now directed is, whether, under this and the preceding acts of Congress, any duties continue to be imposed; in other words, whether they were not all repealed by this act after the 30th of June, 1842. Certainly the provision that they shall be paid in cash, and assessed upon the home valuation, is no repeal.

Can the provision, that such duties should be laid, after the time above mentioned, as were necessary to an economical administration of the government, be construed to repeal all the duties existing at that time? We think not. The court are not authorized to decide upon the amount of revenue necessary to an economical administration of the government. It is a question for the legislature. And the provision in this clause of the section addresses itself to future legislative bodies, and not to the tribunals and officers whose duty it is to carry into execution the laws of Congress. And we should hardly be justified, by any rule for the judicial interpretation of statutes, in pronouncing terms like these to be an implied repeal of all duties after the time specified, when that construction would make the law inconsistent with itself, by repealing, in the 3d section, the duties it had continued in force in the 1st and 2d. On the contrary, the true judicial inference would rather seem to be, that it was supposed, at the time of the passage of the act, that the modified duties remaining imposed on the 30th of June, 1842, might produce the proper amount of revenue to be levied with a view to the economical administration of the government; but leaving it to Congress, when the time arrived, to alter and modify them in the manner and for the purposes specified in this act.

The 4th section merely provides that certain enumerated articles shall be admitted to entry free from duty from December 31st, 1833, until the 30th of June, 1842, and therefore contains nothing that can influence the decision of the court.

The 5th section declares certain articles free after the 30th of June, 1842, and then provides, that all imports on which the 1st section operates, and all articles, which were at the time of the passage of the law admitted to entry free from duty, or paying a less rate of duty than twenty per cent. ad valorem, before the 30th day of June, 1842, may be admitted to entry subject to such duty, not exceeding twenty per cent. as shall be provided for by law; and this section, as well as the third, has been much relied on in opposition to the duty claimed by the government. But is it not like the clause in the 3d, of which we have already spoken, the language of compromise and agreement, and addressed to those who should be afterwards called upon to legislate on the subject, rather than to the administrative tribunals and officers of the country? It reserves to Congress the right to reduce the duties continued by the 1st section below twenty per cent.; to impose duties on free articles, and to *raise duties [*27
which were below twenty per cent. up to that amount.
Yet nobody could have supposed that Congress would not

have the power to do all this, if it thought proper to exercise it, without any reservation of this description. The clause obviously was not introduced to reserve power, but with a view to the manner in which it should afterwards be exercised. As a mere question of power, Congress undoubtedly had authority, after the 30th June, 1842, as well as before, to impose any duties it saw fit upon the articles referred to, or upon any other imports. And it cannot be supposed that the Congress of 1833 intended to restrict, by force of law, the rights of a future Congress. Yet if we lose sight of the compromise character of the act, and treat it as an ordinary act of legislation, we should be bound to say, from the language used, that the Congress of 1833 supposed that the modifications of the revenue made by them could not be altered by a subsequent legislature, unless the right to do so was expressly reserved. No one would think of placing such a construction upon the section in question; and the difficulty is removed when we look at it in what we doubt not is its true light, and regard it as a compromise of conflicting opinions, which it was believed would be afterwards respected, when it had thus been solemnly set forth in a law. In this view of the subject, it is not repugnant to the 1st and 2d sections, and leaves the duties retained by them in full force after the 30th of June, 1842, until they should be altered by subsequent legislation.

The 6th and last section, the contents of which have been already stated, still more clearly marks the character of the act; and upon a view of the whole law, the court are of opinion that the duties which were in force on the first of July, 1842, continued in force, until they were afterwards changed by act of Congress.

This brings us to the remaining inquiry, whether, after the 30th of June, 1842, there were any regulations in force, by which the officers of the revenue were authorized to collect the duties which had not been repealed by the act of 1833; and this question may be disposed of in a few words, as it rests altogether upon the 3d section, the material parts of which have been already stated.

Before the passage of the act of 1833, there was certainly regulations prescribed by law, abundantly sufficient for the collection of the revenue. The clause at the close of the 3d section, which directs that after the time so often referred to, the duties shall be assessed upon the value at the port where the goods are entered, "under such regulations as may be prescribed by law," can scarcely be considered as an implied repeal of all previous regulations; for it does not confine the regulations spoken of to such as might afterwards be enacted,

but uses the ordinary legislative language appropriate to the subject, which naturally and evidently embraces all regulations lawfully existing at the time the home duties went into operation, whether made before or afterwards. They can, by *no just rule of construction, be held to repeal [*28 pre-existing ones, nor to require any new legislation upon the subject, unless it should turn out that those already in force were insufficient for the purpose.

But it has been urged that this clause, taken in connection with the new rule of home valuation, then for the first time established, and to which they refer, shows that new regulations were contemplated, inasmuch as the existing legislation upon that subject had been directed altogether to the value at the place of export. This argument would undoubtedly be entitled to great weight, if the subsisting rules and regulations could not be applied to this new mode of assessing the duties. But if the regulations already in force were applicable to this new state of things, there is no reason for concluding that there was any intention to repeal them, even although it should appear that they had been framed with a view to the foreign value, and should be found more difficult of execution, and less satisfactory in the result, when applied to the value at the port of entry.

The most important regulations in relation to this part of the case are contained in the 7th, 8th and 9th sections of the act of July 14th, 1832. It is true, that these regulations point to the value of the goods at the place of export; and many of the powers particularly conferred on the appraisers would not assist them in ascertaining the value at the place of import, and could not be used for that purpose. But the substantial and manifest object of these regulations is to enable the proper officers to determine the amount, upon which the rate of impost fixed by law is chargeable; and if the place, with reference to which the valuation is to be made, is changed, it does not by any means follow, that the powers before given to the officers, and the duties imposed upon them, are not still to be exercised and performed so far as they are applicable to the new state of things. The object and intention of the valuation is still the same. It is to execute the law, and to assess and collect the duty prescribed. Thus, for example, the 7th section of the act of 1832 declares, among other things, that it shall be the duty of the appraisers, and of every person acting as such, by all reasonable ways or means in his power, to ascertain, estimate, and appraise the true and actual value of the goods, at the time purchased and the place from which they were imported. The place of valu-

ation is afterwards changed by the act of 1833, and the duty imposed according to the value at the home port. It would be a most unreasonable interpretation of the law, to say, that the appraisers must still go through the ceremony of estimating the value at the foreign port; or, that the mere change of place repealed the authority to value at all. In both cases the only object of the appraisement is to ascertain the sum upon which the duty is to be calculated; and the value of the goods at the foreign port, or at the home port, is of no importance to the public except in *so far as it fixes the sum upon which the collector is to levy the rate of duty directed by law.

*29]

The 9th section makes it the duty of the Secretary of the Treasury, under the direction of the President, from time to time to establish such rules and regulations, not inconsistent with the laws of the United States, as the President shall think proper, to secure a just, faithful, and impartial appraisal of all goods, wares, and merchandises, as aforesaid imported into the United States, and just and proper entries of such actual value thereof, and of the square yards, parcels, or other quantities, as the case may require, and of such actual value of every of them; and it is made the duty of the Secretary of the Treasury to report all such rules and regulations, with the reasons therefor, to the next session of Congress. It is very clear that any regulations within the authority thus given, are regulations prescribed by law. And although this section, as well as the others before mentioned, undoubtedly contemplated the value at the foreign port, yet when the valuation is transferred to a home port, it was still the duty of the Secretary of the Treasury to frame rules and regulations to ascertain the value upon which the law directed that the duty should be assessed. For this is the only object of the appraisement, and the only purpose for which rules and regulations are to be framed.

Indeed, when it is evident that under the act of 1833 certain duties, as therein modified, were continued after the 30th of June, 1842, it would scarcely consist with judicial duty, to give an over-technical construction to doubtful words, which would make the legislature inconsistent with itself, by imposing a duty on goods imported, and at the same time repealing all laws by which that duty could be collected. For it cannot be supposed that Congress, in one and the same law, could so have intended; and such an intention ought not to be implied, unless it was apparent from unequivocal language. We think that there are no words in the act of 1833, from which such a design can fairly be inferred.

It appears from the case stated, that the goods in question were subject to a duty of twenty per cent. under the 1st section of the last mentioned act; and that the duties in this case were assessed accordingly upon the value of the goods at the port at which they entered, as ascertained and appraised under the rules and regulations established by the Secretary of the Treasury under the direction of the President. In the opinion of the court, they were lawfully assessed and collected, and the judgment of the Circuit Court is therefore affirmed.

We forbear to express an opinion upon the construction of the act of 1839, which was argued in this case, because it is understood that other cases are standing for argument, in which that question alone is involved; and it is proper to give the parties an opportunity of being heard before the point is decided.

*Mr. Justice McLEAN. [*30

The decision of this case turns upon the construction of the act of 1833, and as I differ from the opinion of a majority of the judges, I will state, in a few words, my views upon the subject.

The 1st section of the act provides, that ten per cent. on the existing duties shall be deducted annually, until the duties shall be reduced to twenty per cent.

The 3d section declares, "that until the 30th day of June, 1842, the duties imposed by existing laws, as modified by this act, shall remain and continue to be collected. And from and after the day last aforesaid, all duties upon imports shall be collected in ready money; and all credits now allowed by law, in the payment of duties, shall be, and are hereby abolished; and such duties shall be laid, for the purpose of raising such revenue as may be necessary to an economical administration of the government; and from and after the day last aforesaid, the duties required to be paid by law on goods, wares, and merchandise, shall be assessed upon the value thereof, at the port where the same shall be entered, under such regulations as may be provided by law."

The above sections can scarcely be misapprehended by any one. The 1st section reduces existing duties, in a time and manner stated, to twenty per cent. And the 3d section provides, "that until the 30th of June, 1842, the duties imposed by existing laws, as modified by that act, shall remain and continue to be collected. Now the inference is irresistible, that after the above date, the duties shall not be collected under those laws. And this is shown conclusively by the 5th sec-

tion, which provides, that all imports on which the 1st section of the act may operate, and all articles then admitted to entry free from duty, or paying a less rate of duty than twenty per centum ad valorem, before the said 30th day of June, 1842, from and after that day, may be admitted to entry subject to such duty, not exceeding twenty per centum, ad valorem, as shall be provided by law."

Now, these are not terms of compromise, but of enactment. After the day specified, the law declares, that the duties shall not exceed twenty per cent. This, like all other laws, was liable to be repealed, expressly or by implication. But it is law, until so repealed. The duties are not to exceed twenty per cent., but that does not establish them at twenty per cent.

The 6th section of the act repeals all laws inconsistent with it. The twenty per cent. duties, by this act, were to be continued only to the 30th of July, 1842. After that, by the same act, the duties were not to exceed twenty per cent. Here is no repugnancy in the law, because the one provision is to cease at the same time that the other begins to operate. It is impossible that both enactments can be in force at the same time. They are inconsistent with each other. The one provision fixes a definite amount of duties, the other an indefinite amount. Not to exceed twenty per cent., is not twenty *31] *per cent. To give effect to this provision, further legislation was necessary. But, is it the less binding on that account? Can it be disregarded on the ground that it was a mere matter of compromise? It has the form and solemnity of law, and it shows, that the act imposing duties expired on the 30th of July, 1842.

That this was the view of Congress, is manifest from the fact, that in due time they passed an act regulating the duties, to take effect from the above date, which did not receive the signature of the executive. But this is no reason why we, by construction, should continue in force a law which Congress had repealed. After the above date, such duties were to be imposed "as shall be provided by law." Now, this language cannot be mistaken; and it is inconsistent with the idea, that the law imposing duties prior to that date, should, after it, continue in force. Such a construction is unwarranted by the 3d section and the whole tenor of the act.

It is not for this court to determine, whether Congress, in this respect, acted wisely or unwisely; whether their motive was to compromise great and conflicting interests or not; but what have they declared to be law? It would be a restriction on the legislative power, hitherto unknown, to say, that Con-

gress cannot repeal a law, unless they substitute another law in its place.

If the duty law in force prior to the 30th of July, 1842, be inconsistent with the provisions of the act under consideration, then the prior law is repealed. And it is no answer to this to say, that the prior law, in its modified form, is in force by virtue of the act of 1833. The plain and unequivocal enactments of that act repudiate such an inference. In its modified form, the prior law, by that act, expired in 1842. And after that, a new enactment, in my judgment, was essential, not only to continue duties upon foreign merchandise, but also to give effect to all the important provisions of the act of 1833.

The 3d section, after July, 1842, abolishes all credits for duties, and requires them "to be paid in ready money;" and it further provides, "that duties shall be laid for the raising of such revenue as may be necessary to an economical administration of the government;" and that the duties "required to be paid by law," "shall be assessed upon the value of the goods at the port where the same shall be entered, under such regulations as may be prescribed by law."

Now, every one of these provisions was adopted with reference to its taking effect from, and after the 30th of July, 1842. They all belong to the same class. The credit for duties was to be then abolished, and prompt payment required. From and after that day, duties were to be laid to meet the expenditure of an economical administration of the government. And after that day, "the duties required to be paid by law," were to be assessed on the value of the goods at the port of entry; and this assessment is required to be made, "under such regulations as may be prescribed by law." *These provisions cannot, by any known rule of construction, be made to refer to laws or regulations existing at the time of their enactment. They all refer to the future: to future laws, and regulations prescribed by those laws. [*32

The existing laws made no provision to carry into effect the changes in the system, introduced by the act of 1833. Appraisers were appointed under former acts, but there was no law or regulation as to the home valuation. This was a most important matter, under the new system. And it is perceived, from the explicit provision of the act of 1833, that Congress did not intend to leave an arrangement of so much importance to the discretion of the Secretary of the Treasury or of the President. They declare, that the duties shall be assessed, "under such regulations as *may be* prescribed by law." This is not to be met by argument. It is matter of law.

No one can doubt, that laws in relation to duties, not inconsistent with the act of 1833, may be considered in giving a construction to that act. But I am yet to learn, that such laws, by any construction, can suspend or modify the positive enactments of the act of 1833. Such a power belongs not to the executive nor the judiciary, but to Congress.

JAMES BARRY, PLAINTIFF IN ERROR, *v.* HAMILTON R. GAMBLE.

Under the act of 1815, a New Madrid certificate could be located upon lands before they were offered at public sale under a proclamation of the President, or even surveyed by the public surveyor.[1]

The act of 1822 recognized locations of this kind, although they disregarded the sectional lines by which the surveys were afterwards made.

Under the acts of 1805, 1806, and 1807, it was necessary to file the evidences of an incomplete claim under French or Spanish authority, which bore date anterior to the 1st of October, 1800, as well as those which were dated subsequent to that day; and in case of neglect, the bar provided in the acts applied to both classes.[2]

A title resting on a permit to settle and warrant of survey, dated before the 1st of October, 1800, without any settlement or survey having been made, was an incomplete title and within these acts.

And although the acts of 1824 and 1828 removed the bar as it respected the United States, yet, having excepted such lands as had been sold or otherwise disposed of by the United States, and saved the rights or title of adverse claimants, these acts protected a new Madrid claim which had been located whilst the bar continued.[3]

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[1] FOLLOWED. *Mills* v. *Stoddard*, 8 How., 362. CITED. *Lessieur* v. *Price*, 12 How., 75.

A sale of public lands by the executive of the federal government, before the public surveys, is void; but if the public survey is regularly made, returned and approved, the sale is valid, even though the survey is defective or erroneous, if such defect does not render the identity of the plot uncertain as to locality or quantity. *Rector* v. *Gaines*, 19 Ark., 70; *Ashley* v. *Rector*, 20 Ark., 359; *Gaines* v. *Hale*, 26 Ark., 168; *Strother* v. *Lucas*, 12 Pet., 438; *Steinback* v. *Moore*, 30 Cal., 498; *Trimble* v. *Smith's Adm'r*, 1 Tex., 790; *Warren* v. *Shuman*, 5 Tex., 441.

For decisions appertaining to the New Madrid district, see *Lessieur* v. *Price*, 12 Mo., 14. S. C. 12 How., 74; *State* v. *Hum*, 19 Mo., 592, 606 (similer statute); *Gray* v. *Givens*, 26 Mo., 291; *Baynell* v. *Broderick*, 13 Pet., 448; *Cabaune* v. *Lindell*, 12 Mo., 184; *Gibson* v. *Chouteau's heirs*, 39 Mo., 536.

[2] An incomplete claim to land under Spanish authority, was admitted in evidence for the purpose of showing that Spain had arrested a title to the premises in controversy, and for the purpose of laying a predicate, from which it was presumed that the defendant and those under whom he claimed, had been in possession for twenty-one years, and he there acquired a title by prescription; even though the evidence of title had not been recorded or directed by the acts of Congress of 1805, 1806, and 1807. *Doe d. Farmer's Heirs* v. *Eslava*, 11 Ala., 1038; *Minturn* v. *Brower*, 24 Cal., 644, 667.

[3] APPLIED. *Les Bois* v. *Bramell*, 4 How., 458. CITED. *Hot Springs Cases*, 2 Otto, 712, 713.

Barry *v.* Gamble.

THIS case was brought up from the Supreme Court of Missouri, by a writ of error issued under the 25th section of the Judiciary act of 1789.

It was an ejectment brought by Gamble, the defendant in error, against Barry, to recover possession of a tract of land in St. Louis county, Missouri.

*The question was one of title. Gamble, the plaintiff below, claimed under a grant issued to Baptiste Lafleur in conformity with the New Madrid act passed in 1815, and Barry, under the title of Mackay, which was before the Supreme Court of the United States in 1836, and is reported in 10 Pet., 340. In the court below the parties entered an agreement upon record, in the following words:—"It is agreed that the title of the plaintiff (Gamble) to the land in the declaration mentioned, is the title under the patent issued to Baptiste Lafleur, or his legal representatives, and that the title of the defendant (Barry) is the title under the confirmation to the legal representatives of James Mackay; and if it shall be adjudged that the patent is a better title than the confirmation, then the plaintiff shall recover the land in the declaration mentioned; and if the confirmation shall be adjudged the better title, then the defendant shall have judgment." [*33

On the 13th of September, 1799, Mackay presented the following petition:

"To Charles Dehault Delassus, lieutenant-colonel attached to the first regiment of Louisiana, and commander-in-chief of Upper Louisiana.

"James Mackay, commandant at St. Andre, of Missouri, being established at the said village of St. Andre on the bank of the Missouri, but having the intention of establishing a habitation in the neighborhood of Mr. Papin, between St. Louis and the river Des Peres, he prays you to grant him, in entire property, 800 arpents of land, in superfices, bounded on the south by land of Mr. Papin and Madame (widow) Chouteau; on the east by the lands of the common field of Kiercereau, l'Anglois Taillon, and others, at the Great Marais; on the west by James McDaniel; and on the north and northeast by the land of Mr. Chouteau and the domain of the king. Knowing the zeal and fidelity of the suppliant in the service, he hopes this grace of your justice. JAMES MACKAY.

"*St. Louis*, 13*th September*, 1799."

On the next day, the following order was issued.

"*St. Louis, of Illinois*, 14*th Sept.*, 1799.

"The surveyor, Don Antonio Soulard, will put the inter-

ested party in possession of the tract of land which he solicits by his memorial; which having done, he shall form a plat, delivering it to this party, and a certificate, in order that it may serve to obtain the concession and title in form from the senior intendent-general of these provinces, to whom, by order of his majesty, belongs particularly the distributing and granting of every class of vacant lands.

"CHARLES DEHAULT DELASSUS."

In January, 1800, a grant was made to Chouteau for the
*34] land referred to in the preceding papers. This circumstance is commented upon by the Supreme Court of the United States in the decision upon Mackay's case, 10 Pet., 341.

On the 2d of March, 1805, Congress passed an act "for ascertaining and adjusting the titles and claims to land within the territory of Orleans and the district of Louisiana," the general purport of which was to recognize all existing complete grants. It provided for the appointment of three persons who should examine, and decide on, all claims submitted to them and report the result to the Secretary of the Treasury, who was directed to communicate it to Congress. It further provided that all papers relating to claims should be delivered to the register or recorder, on or before the 1st of March, 1806, for the purpose of being recorded, and declared that, with regard to incomplete titles, any person who should neglect to deliver notice of his claim or to cause the written evidence of it to be recorded, should lose his right, and his claim should for ever thereafter be barred.

On the 21st of April, 1806, Congress passed an act supplementary to the above, the 3d section of which extended the time for filing written evidences of claims to the 1st of January, 1807. It further enacted that "the rights of such persons as should neglect so doing, within the time then limited, should be barred, and the evidences of their claims never after admitted as evidence."

Neither the concession or claim of Mackay was presented to, or filed with the recorder or board of commissioners, under either of these acts.

On the 17th of February, 1815, Congress passed an act declaring that any person or persons owning lands in the county of New Madrid, in the Missouri territory, with the extent the said county had on the 10th day of November, 1812, and whose lands had been materially injured by earthquakes, should be and they were thereby authorized to locate the like

quantity of land on any of the public lands of said territory, the sale of which was authorized by law.

On the 30th of November, 1815, a certificate was issued to Lafleur, by the United States recorder, Frederick Bates, authorizing him to locate 640 acres on any of the public land of the territory of Missouri, the sale of which was authorized by law.

On the 7th of July, 1817, Theodore Hunt filed a notice of location under said certificate, with the surveyor-general.

In the fall of 1817, (as it appeared upon the trial from the deposition of Joseph C. Brown, deputy surveyor of the United States,) the district embracing the land in question was surveyed under the authority of the United States, but the survey was not closed until the spring of 1818. The impression of the witness was, that the return of the surveyor was made to the general land-office in 1820.

In April, 1818, the survey of Hunt's location was made by the said Brown, who placed it in township No. 45 north, range No. 6 and 7 east. It called to begin at the north-east corner of Papin's *survey, and ran round several courses [*85 and distances, disregarding the cardinal points, in a square form, and calling for the lines of other tracts as boundaries.

On the 26th of April, 1822, Congress passed an act, directing "that the locations heretofore made of warrants issued under the act of the 15th of February, 1815, (the New Madrid law,) if made in pursuance of the provisions of that act in other respects, shall be perfected into grants, in like manner as if they had conformed to the sectional or quarter sectional lines of the public surveys." The second section directed that those who located such warrants thereafter should conform to the sectional and quarter sectional lines of the public surveys, as nearly as the quantities would admit.

On the 13th of June, 1823, the President of the United States issued a proclamation, directing the public lands in township No. 45 north, range No. 6 and 7 east, (amongst other lands,) to be sold on the third Monday of the ensuing November. These ranges included the land in controversy.

On the 20th of May, 1824, Congress passed an act "enabling the claimants to lands within the limits of the state of Missouri and territory of Arkansas to institute proceedings to try the validity of their claims." It allowed any persons claiming lands under old concessions or surveys, under certain circumstances, to present a petition to the District Court of the state of Missouri, which court was authorized to give a decree in the matter, reviewable, if need be, by the Supreme Court of the United States. The 5th section provided that a claim not

brought before the District Court in two years, or not prosecuted to final judgment in three years, should be forever barred both at law and in equity. The eleventh section enacted, "that if in any case it should so happen that the lands, tenements, or hereditaments, decreed to any claimant under the provisions of this act, shall have been sold by the United States, or otherwise disposed of, or if the same shall not have been heretofore located, in each and every such case it shall and may be lawful for the party interested to enter, after the same shall have been offered at public sale, the like quantity of lands, in parcels comformable to sectional divisions and subdivisions, in any land-office in the state of Missouri," &c., &c.

On the 26th of May, 1826, an act was passed, continuing the above act in force for two years.

On the 13th of June, 1827, a patent was issued to Lafleur, and his legal representatives, for the land included in the New Madrid certificate, location, and survey.

On the 24th of May, 1828, another act of Congress was passed, by which the act of 1824 was continued in force, for the purpose of filing petitions, until the 26th day of May, 1829, and for the purpose of adjudicating upon the claims until the 26th day of May, 1830.

*36] On the 25th of May, 1829, Isabella Mackay, widow, and the children *and heirs of James Mackay, deceased, filed their petition in the District Court of Missouri, praying for the confirmation of eight hundred arpents of land, referring to the petition of Mackay, the concession and order, above set forth, as the foundation of the claim.

In February, 1830, the District Court decided against the claim.

In January, 1831, the heirs of Mackay filed a petition in the Supreme Court of the United States, stating that, by the act of 1824, they were allowed a year from the rendition of the decree to appeal from it, that the District Court of Missouri was closed on the 26th of May, 1830, and praying to be allowed the benefit of an appeal. The prayer was granted, and the cause came on for hearing in 1836. The decision is reported, as before stated, in 10 Pet., 240, by which the decree of the District Court was reversed.

In 1837, Gamble, claiming title under Lafleur, brought an ejectment in the Circuit Court of the state of Missouri, for the county of St. Louis, against Barry. The venue was changed to the county of St. Charles, and afterwards to the county of Lincoln, where it was tried, and on the 2d of September, 1840, the jury found a verdict for the plaintiff.

In the mean time, to wit, on the 31st of March, 1840, Mackay's representatives had obtained a patent from the United States for the land in controversy.

During the trial of the cause, the plaintiff asked the court to give to the jury the following instructions:

"That the title to the premises, in the declaration mentioned, under the patent to Baptiste Lafleur, or his legal representatives, is a better title in law than the title under the confirmation to the legal representatives of James Mackay, deceased; and, therefore, the plaintiff in this case is entitled, under the agreement of the parties, to recover the possession of the land in the declaration mentioned;" which instruction was given by the court, and excepted to by the counsel of the defendant.

The defendant by his counsel, then asked the court to give the following instructions:

"That, inasmuch as the confirmation and patent given in evidence by the defendant show the legal estate in the premises to be vested in the widow and heirs of Mackay; and, inasmuch as the plaintiff has not shown any title under said Mackay, or his representatives, the defendant is entitled to a verdict;" which instructions the court refused to give, and the defendant excepted to such refusal.

The case was carried to the Supreme Court of the state of Missouri which, in September, 1842, affirmed the judgment of the court below; and, to review that opinion, a writ of error brought the case before the Supreme Court of the United States.

The cause was submitted upon printed arguments, by *Lawless* for the plaintiff in error, and *Spaulding* for the defendant in error. *These arguments occupy nearly fifty pages in print, and the reporter regrets that his limits will not permit their insertion, *in extenso*. [*37

Lawless argued that the power of the government of the United States, after the cession of Louisiana, was not as great over incomplete titles to land as that of the King of Spain; and although it might be true that the latter possessed the power of recalling the title and granting the land to another person, yet the government of the United States was controlled by the treaty of cession, by the law of nations, and by the Constitution and laws of the United States. The question presented to the officers of the United States was not whether the King of Spain could have arbitrarily annulled the grant to Mackay, but whether, at the date of the treaty, it was not

entitled, under the laws and usages of the Spanish government, to be consummated and clothed with the forms of a complete title. He then proceeded thus:

"But it was not merely complete titles that constituted property, and proof of property, in land, under the French and Spanish government in Louisiana. Those grants and orders of survey, made by the lieutenant-governor of Upper Louisiana, of which the Supreme Court of Missouri speaks with such contempt, constituted property, and imparted a right of property, just as much as a complete title could do. This has been specifically laid down as law by the Supreme Court of the United States. In every case, on appeal from the United States District Court of Missouri, under the act of 1824, in which the decree of that court was reversed, and the claim confirmed, the Supreme Court of the United States based their confirmation on the ground that such a title created property, and, as such, was protected by the treaty. In the case of *Delassus* v. *The United States*, and in this very case of *Mackay's Widow and Heirs* v. *The United States*, Chief Justice Marshall, who delivered the opinion of the court, on this head is unambiguous and peremptory. 'In Delassus' case,' says the chief justice, 'the language of the treaty excludes every idea of interfering with property—of transferring lands which had been severed from the royal domain.' In Mackay's case, the chief justice reiterates this doctrine; indeed, not only the reasoned opinion of the Supreme Court of the United States in this case, as reported in 9 Pet., treats the grant to Mackay as having constituted property, and a title to the land described in it at the date of the treaty, but the formal decree of the court, as the same is set out on the present transcript, exhibits this ground of confirmation. The court, on turning to this decree, as spread on the transcript, will find these words: 'It is further ordered, adjudged, and decreed, that the title of the petitioners to the land described in this petition to the District Court is valid by the laws and treaty aforesaid, and the same is hereby confirmed as therein
*38] described, and that the surveyor of the public lands in Missouri be, and is hereby, *directed to survey the quantity of land claimed in the place described in the petition and grant, or concession.'

"It is manifest, from the terms of this formal decree, that the Supreme Court of the United States took a very different view of the original title of Mackay from that which the Supreme Court of Missouri has presented. It is difficult to conceive how the Supreme Court of Missouri, with those opinions and the decree in favor of Mackay before them,

could have attributed to the grant to Mackay such an unsubstantial and shadowy character, as not only to be liable to be annulled by the order of an absolute king, but by the arbitrary fiat of an intendant-general at New Orleans; and it is still more difficult to conceive how, with the treaty before them, and the decree of the Supreme Court based upon that treaty, they could have come to the conclusion that Mackay had no property in the land described in his petition and concession at the date of the treaty.

"It is submitted, therefore, that the Supreme Court of Missouri, when they treat the grant to Mackay, and his title under it to the land which it describes, as a something which Congress might, or might not, as it best pleased them, annul or acknowledge, do not sufficiently respect the decisions of this high court, or do not understand them.

"We have already observed, that whatever might have been the power of the Spanish king over the grant to Mackay, previous to its being perfected into a complete title at New Orleans, the treaty of cession, and transfer of the province of Louisiana, for ever protected the grantee from its arbitrary exercise, and that no power was imparted to Congress, other than that of confirming the grant if the treaty protected it, and which power has had its final action.

"But we must deny, with all due respect to the Supreme Court of Missouri, that, previous to the treaty of cession, the grant to Mackay, and his right and title to the land described in that grant, were so entirely at the mercy of the government, be that government Spanish or French, as the opinion of the Supreme Court would intimate.

"The established fact, that Mackay's grant created a right of property, repels such a doctrine. It is true, that the King of Spain was, in a political sense, and as contradistinguished from constitutional sovereigns, an absolute monarch; but it is no less true, that in Spain and her colonies the rights of property were religiously respected and protected. The 'Recopilacion,' the '*siete partidas*' under Spain; the custom of Paris, under the kings of France, were as protective of private rights, as English or American law could be, and perhaps more so. When it is considered, that grants and orders of survey in Upper Louisiana were disposed of and adjudicated upon as property; when the records of that province abundantly prove, that property of this description was sold and transferred *inter vivos*, and descended, and became distributable *ab intestato*, and was the subject-matter of last wills and testaments, it would seem to be a necessary *consequence, that such property was protected by law, and that the [*39

title to it was not at the mercy either of the King of Spain or the First Consul of France, and still less of the intendant-general at New Orleans.

"In every case (and few can be cited) in which land, previously granted by the authorities of Louisiana, has been conceded to a third person, it will be found, either that the first grant was forfeited by the non-performance of a condition, or that the land included in it was formally re-united to the royal domain. It will be seen, by reference to all the concessions and grants, even those which have been consummated by the signature of the governor-general previous to 1798, or that of the intendant-general and assessor subsequent to that year, that, so cautious was the government and careful, in their protection of private vested rights, there was uniformly a proviso or saving clause in each grant, declaring that it should prejudice nobody."

Lawless then argued, that Congress had never intended to annul the grant to Mackay; that the 4th section of the act of 1805, and 5th section of the act of 1807, did not include it, because they referred to, and operated upon, only such grants or incomplete titles as bore date subsequent to the 1st of October, 1800, whereas the grant to Mackay was in September, 1799. And admitting, for the sake of argument, that it was affected by those acts, yet the forfeiture was waived by the United States, and his claim placed on a perfect level with every other by the acts of 1824, 1826, and 1828.

With regard to the opposing titles, under the New Madrid location, Mr. *Lawless* contended, that it was void, because laid upon land which was not "public land," because it belonged to Mackay; or, if it was public land, it was not land "the sale of which had been authorized by law," and referred to the opinions of Mr Wirt and Mr. Butler in the "Opinions of the Attorneys-General of the United States," edited by Gilpin, pp. 263, 273, 1199; and then proceeded thus:—

We have endeavored to demonstrate, that the very first element, the subject-matter itself, of Lafleur's location was wanting; that the land covered by his location was not public land, and never has been since the date of the grant of it to James Mackay, in 1799.

As to the second requisite, that the location should be made on land, the sale of which was authorized by law, the question presents itself, by what law? The only law that regulated, at that time, the sale of public land, was the act of February 15th, 1811, (2 Story's Laws, p. 1178).

By the 10th section of that act, the President of the United

States is authorized to direct such of the public lands as shall have been surveyed to be offered for sale, with the exception,

1. Of section No. 16 in each township;

2. Of a tract reserved for the support of a seminary of learning;

*3. Of all salt springs, lead mines, and lands contiguous thereto; [*40

4. Of all tracts of land, the claim to which has been filed in due time, and according to law presented to the recorder, for the purpose of being investigated by the commissioners appointed for ascertaining the right of persons claiming lands in the territory of Louisiana: (by the act of Congress, June 4th, 1812, styled, under the new organization, the Territory of Missouri.)

It must be conceded, that, under this 10th section of the act of 1811, the President had no authority to direct that any land should be offered for sale, until after the survey thereof.

The object of this inhibition was, manifestly, that the system of surveys should be fully established, and the sales and entries in the land-offices should conform to the sectional divisions and sub-divisions.

It is no less manifest, that another object in thus restricting the power of the President was, to ascertain the precise location of the salt springs and lead mines in the territory of Missouri, and the quantity of land contiguous thereto, and which, for the working of those mines, ought to be reserved from public sale.

It is equally clear, that a respect for vested rights, and for the treaty of cession, dictated the reservation of lands included in claims filed under the requirements of the acts of Congress, in the office of the United States recorder.

Now, it really seems difficult to comprehend on what principle a New Madrid locator could treat as land authorized to be sold, and as public land, that very land which the President of the United States was forbidden so to treat.

The counsel for the plaintiff in error respectfully contends, (with all deference to the Supreme Court of Missouri,) that the exceptions and reservations, and conditions as to surveys in the 10th section of the act of 1811, are, and were, very good and wise provisions, and that a location, such as that under Baptiste Lafleur, being made in total disregard and violation of those enactments, is not an irregularity merely, but an absolute nullity.

The effort by the Supreme Court of Missouri to cure the original defects of the location by the operation of the act of 1822, has been already commented on, and the fallacy of the

reasoning, it is hoped, established. That act certainly did not cure the defect of a location on a salt spring, or a lead mine, or a sixteenth section, still less upon private property.

It may be that the act of 1822 was concocted and intended to effect such impolitic and iniquitous results, but, fortunately, the terms of that act do not justify such an application of its provisions, and certainly the intention of those who applied for and obtained its passage is entitled to no consideration.

A proclamation by the President of the United States was *41] not issued till 1823, and of course no sale of lands till that year took *place in Missouri. The surveys were not returned till 1822. It was impossible that the President could have known what lands he should direct to be sold until those surveys were returned and examined, and approved at Washington city.

It was under the 3d section of the act of 17th of February, 1818, that the President directed the lands in the district of St. Louis to be offered for sale. That law did not, in any respect, affect the exceptions and reservations in the 10th section of the act of 1811. The 3d section of the above act of 1818 provides, that whenever a land-office shall have been established in any of the "districts for the land-office" created by the 1st section, the President shall be authorized to direct so much of the lands, lying in such district as shall have been surveyed according to law, to be offered for sale, with the same reservations and exceptions, and on the same terms and conditions, in every respect, as was provided by the 10th section of the act of 1811.

Thus, it may not only be contended, that, notwithstanding the act of 1811, the President was not empowered to direct a sale until after the passage of the act of 1818, which created the machinery of sale, and portioned out Missouri into "land districts."

There was no law for the sale of the land in the St. Louis district at all in force at the date of the location by Hunt, under Lafleur, to wit, on the 17th of July, 1817. There was, at that time, in existence, neither a St. Louis land district, nor a St. Louis land-office, nor, as has been shown, any public survey made according to law. The land in Missouri (at least in that region of it in which Mackay's grant is located) was, on the 17th of July, 1817, in the same state as on the date of the last private survey made under the Spanish and American governments respectively.

How, then, can it be successfully argued, that a location thus premature—thus, not only not authorized, but in direct violation of two acts of Congress, was only an "irregularity?"

The case of *Lindsay and others* v. *Lessee of Miller*, 6 Pet., 672, and the case of *Jackson* v. *Clark and others*, 1 Pet., 628, have, it is submitted, no bearing or analogy to the case now before this court. In those cases the question arose on a survey, which was manifestly only irregular from the want of certain technical formalities. The surveys, when made, were made on land which lawfully could have been surveyed. The surveys were not absolutely void, and the Supreme Court of the United States therefore decided that the act of 1807 protected them, and that no location of a Virginia military warrant under that act could lawfully be made upon land which had previously been so surveyed.

If there had been a law specifically prohibiting such surveys, or if they had been made on land not by law susceptible of such surveys, no doubt they would have been void, and the Virginia military warrant would have been well laid upon them.

*It may be observed, also, that those surveys, though [*42 irregular, were made officially, and were based on a substantial legal right in the person for whom they were made; whereas the New Madrid location in the present case was, as has been shown, an *ex parte* private act of an interested individual, who had no other color of claim to the land, and was entirely at his own risk. If such a location be declared valid, the locator must necessarily have exercised, in his own case, a high judicial function, namely, the construction of an act of Congress, and not only that, but the functions of a jury of twelve men on a question of fact, and of a witness to prove the fact.

1st. The "locator" construed the words in the act of 1815, "public land, the sale of which is authorized by law," to mean land which, though not at the date of his location authorized, as public land, to be sold, might, thereafter, by possibility, be "authorized to be sold."

2d. The locator assumed the fact, that land which his location called for was "public land."

3d. The locator assumed the fact, that the land located by him contained neither salt spring nor lead mine, nor was "contiguous" to a salt spring or lead mine.

4th. The locator assumed the fact, that when the public surveys should be made, the land would certainly not include, or interfere with, the sixteenth section.

5th. That it would not interfere with seminary land.

6th. That his location would cover no land included in a Spanish or French grant, or order of survey.

This would have been a portentous power, indeed, to vest

even in the New Madrid sufferer; how much more productive of injustice and spoliation, if imparted to a New Madrid speculator!

The counsel for the plaintiff in error, therefore, in conclusion, submits—

1st. That the title to the specific land in dispute is protected by the treaty of cession, and could only be affected or divested by judicial action;

2d. That the title of James Mackay and his heirs has been confirmed by the Supreme Court, because of its original validity, and its being protected and guarantied by the treaty of cession;

3d. That previous to the confirmation of the grant to Mackay, the land included in it has never been re-annexed to the royal domain, or to the public land of the United States;

4th. That the location by Hunt and Lafleur, on the 17th July, 1817, was not merely "irregular," but was absolutely void.

5th. That Congress has not given, nor could give, by any retroactive law, validity as against a vested right to a location void *ab initio*;

6th. That the acts of Congress of 2d March, 1805, section 4, and of March 3d, 1807, section 5, have no operation on the grant to *Mackay, inasmuch as this grant bears date previous to the 1st October, 1800;

*43]

7th. That, even if the acts of 1805 and 1807 bore on the grant to James Mackay, the acts of Congress of 1824, and the acts in amendment and continuation of that, have remitted Mackay and his heirs to all their original right and title;

8th. That the patent, given in evidence by the defendant in error, having been shown to be based on a void location, is itself void at law and in equity;

9th. That the patent having been issued in the year 1827, and pending the protective action of the law of 1824, as respects French and Spanish claimants and grantees, the patentee and his assigns are bound to that act as by a *lis pendens*;

10th. That the protest filed in the office of the surveyor-general at St. Louis, by the agent of the widow and heirs of James Mackay, being three years before the date of the patent under Lafleur, is notice to Lafleur and his legal representatives of the claim and grant of Mackay;

11th. That the confirmation, by the Supreme Court, of the grant to James Mackay, and the patent in pursuance of that decree, which has been issued to the confirmees, constitute a

full and conclusive proof of title to the land in dispute, and therefore ought to prevail against the location under Lafleur, and the patent issued and based upon it; and

12th. That the judgment and opinion of the Supreme Court of Missouri, being against a right and title protected by treaty, and specially set up and claimed under a treaty and a decree of the Supreme Court of the United States, ought to be reversed.

Spaulding, for the defendant in error, stated the case, commented on the nature of an incomplete title, with the power of the government over it, and proceeded thus:—

The position, then, which I assume in relation to the title set up by the plaintiff in error is, that under the operation of different acts of Congress, the negligence of Mackay, the holder, has extinguished the claim. Applying the provisions of these acts of Congress to the title set up by the plaintiff in error, it is manifest that Mackay's claim was barred, by his own negligence, when the title of Lafleur was initiated, and up to the time it was completed by the patent.

The 1st section of the act of 1805, (2 Story's Laws United States, 966,) provides for the confirmation of incomplete titles bearing date prior to the 1st of October, 1800; the 2d section makes grants to settlers who had made improvements by permission of the Spanish officers; the 4th section authorizes those who held land by complete titles, and requires every person who claimed land, either by the 1st section of the act, under an order of survey, dated prior to October, 1800, or under the 2d section, by a settlement under permission of *the Spanish officers, or by any incomplete title [*44 dated subsequent to the 1st day of October, 1800, to file, before the 1st day of March, 1806, with the recorder, a notice in writing, stating the nature and extent of his claim, together with a plat of the tract claimed; and further required that he should, on or before that day, deliver to the said recorder, for the purpose of being recorded, every grant, order of survey, deed, conveyance, or other written evidence of his claim: then, by the proviso to this section, a failure to give the notice, or to record the evidence of title, is made a bar to the claim, and the documents which should have been recorded are never to be received in evidence against a grant from the United States.

The 4th section of the act of 1807, (2 Story's Laws United States, 1060,) extends the jurisdiction of the commissioners to all claims to land in their district, where the claim is made by a person who was an inhabitant of Louisiana, &c., and author-

izes the commissioners to decide according to the laws and established usages and customs of the French and Spanish governments, upon all such claims. This section extends the time for filing notices of the claims, and written evidences of claims, to the 1st day of July, 1808, and declares that the rights of such persons as shall neglect to do so within the time limited by the act, shall, so far as they are derived from or founded upon any act of Congress, ever after be barred, and become void, and the evidences of their claims shall never after be admitted as evidence in any court of law or equity whatever.

This last section extends the jurisdiction to all descriptions of claims, and gives the utmost latitude to the commissioners in seeking the rule by which the claims are to be confirmed, while, at the same time, it is just as imperative as the former law, in requiring the exhibition of the claim and the recording of the written evidence of title. So, the 7th section of the act of 13th June, 1812, (2 Story's Laws, 1260,) contains provisions which have the same effect upon claims and evidences of title not filed and recorded before the 1st of December of that year, declaring that the evidence of the claims shall never be admitted against any grant from the United States.

This court has fully considered these acts in the case of *Strother* v. *Lucas*, 12 Pet., 448, and, remarking generally upon their provisions, the court says—"Congress, well aware of the state of the country and villages, wisely and justly went to the extent perhaps of their powers, in providing for the security of private rights, by directing all claimants to file their claims before a board especially appointed to adjust and settle all conflicting claims to lands. They had in view another important object to ascertain what belonged to the United States, so that sales could be safely made, the country settled in peace, and dormant titles not be permitted either to disturb ancient possessions, or to give to their holders the valuable improvements made by purchasers, or the sites of cities
[*45 which had been built up by their enterprise. Accordingly, we find that, by *various acts, the time of filing such claims is limited, after which they are declared void, as far as they depend on any act of Congress, and shall not be received in evidence in any court, against any person claiming by a grant from the United States.

"These are laws analogous to acts of limitation for recording deeds, or giving effect to the awards of commissioners, for settling claims to land under the laws of the states; the time and manner of their operation, and the exceptions to them,

depend on the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which calls for their enactment. Reasons of sound policy have led to the general adoption of laws of both descriptions, and their validity cannot be questioned. Cases may occur where the provisions of a law may be such as to call for the interposition of the courts, but these under consideration do not. They have been uniformly approved by this court, and ought to be considered as settled rules of decision, in all cases to which they apply."

The court, then, in applying these laws to a title as old as 1787, at page 454, says—"We must, then, take the defendant as one holding the premises in controversy by a grant from the United States, and, as their grantee, entitled to all the protection of the laws appropriate to the case."—"The plaintiff, therefore, is brought within the two provisions of the laws; that by Madame Chancellier not having filed her claim within the time limited by law, she could not set up any claim, under any act of Congress, or be permitted to give any evidence thereof in any court, against a person having a grant from the United States, under the confirmation of the commissioners and the act of 1812."

In the case now before the court, we have an exemplification of the very evils which the court, in the case of *Strother* v. *Lucas*, considered these acts of Congress designed to prevent. We have a man pointing out a portion of unoccupied waste land, as public land, liable to be appropriated by the location of a New Madrid certificate; and after it has been so appropriated and patented by the government, we have a claim set up, by the heirs of that man, under a dormant title, which had been held back, notwithstanding the imperative provisions of these acts of Congress, and stating, on the face of their petition, that it had never been presented to any of the tribunals established for the investigation of such titles.

Had the claim of Mackay been exhibited and recorded as the acts of Congress required, then the 10th section of the act of 3d March, 1811, (2 Story, 1200,) would have expressly reserved the land from sale, until the final action of Congress upon the claim, and a person attempting to appropriate it, by the location of a New Madrid certificate, would have acted with notice that such claim existed; but, as it was not so recorded, there was no evidence upon any land-record of the country that such claim existed; and the land now [*46
*claimed appeared to every person who could have access to these records, to be vacant public land, subject to

any disposition which could lawfully be made of any part of the public domain.

(*Spaulding* then proceeded to comment upon the acts of 1824 and 1828, and particularly upon those clauses which saved the rights of adverse parties; after which he took up the title of Lafleur under the New Madrid grant, and argued thus:)

The plaintiff in error, having given in evidence a notice or application made by Theodore Hunt, for the location of the certificate of Lafleur upon the land in question, dated in July, 1817, and a survey made by a deputy surveyor in April, 1818, with the proclamation of the President for the sale of the land in the township, to take place in October, 1823, objects to the title of the defendant in error, on the following grounds:—1st, That, at the time of the location, the land was not public land; 2d, That if it was public land, the sale of it was not authorized by law, and therefore it was not subject to location.

The first objection of the plaintiff in error, that, at the time of the location, the land located was not public land, subject to be located, is based upon the assumption that it was Mackay's land, and involves the consideration of the argument made against the title of Mackay. If, by the operation of the different acts of Congress, Mackay's negligence had barred his claim, and shut out his evidence of title from the consideration of courts of justice, the land was in every sense public land, subject to such disposition as the government might think proper to make of it. To say it was still his land, as against the government and the grantees of the government, is to assert that his title remained valid, notwithstanding enactments which annulled it, on account of his neglect to comply with the requirements of law. It is unnecessary further to pursue the answer to this objection of the plaintiff in error.

The second objection, upon which most stress is laid, is, that at the time of the location, this land was not of the description liable to location—that is, land the sale of which was authorized by law.

It may be of importance to determine, if we can, from the evidence in this case, when the location was made.

The plaintiff in error has fallen into the mistake of supposing that the notice or application for the location, made in July, 1817, is the location itself. This error might have been avoided by an examination of the decision made by this court in *Bagnell and others* v. *Broderick*, 13 Pet., 436. In that case, the court held, that this notice or application forms no part of the title, and is not part of the evidence on which the general

land-office acted, but the patent issued on the plat and certificate of the surveyor, returned to the recorder's office, and which was by him reported to the general land-office. Again, the court says:—"The only evidence of the location recognized *by the government as an appropriation, [*47 was the plat and certificate of the surveyor."

As the notice or application is not the location, we next look to the survey spread on the record: this is dated in April, 1818, as the time when the deputy surveyor of the United States made the survey on the ground, but when this survey was returned to the office of the surveyor-general, or when it was approved in that office, does not appear, and especially it does not anywhere appear on the record when the surveyor-general returned to the recorder of land-titles the plat with the notice, designating the tract located, as required by the second section of the act, nor when the recorder issued the patent certificate under the 3d section.

In this state of the evidence, it cannot be known whether the survey made by the deputy surveyor, although dated in April, 1818, was returned, or, if returned, was approved in the office of the surveyor-general, at any time anterior to the proclamation by the President for the sale of the land in the township.

It appears, by inspection of the survey given in evidence, that it was made after the public surveys had established the townships, &c., as it describes the land as situated in two townships. The question, therefore, which the plaintiff in error has attempted to raise, is not presented by the record. But it is not my purpose to avoid the discussion of the question, if we can really get it into a tangible form.

The question, if I have understood the argument made in behalf of the plaintiff in error, is, whether the patent issued to Lafleur is not void, because the survey was made for him at a time when the sale of the land was not authorized by law?

If we turn again to the language of the act, we find that the words upon which most stress is laid—"the sale of which is authorized by law"—are used as descriptive of the land to be located, and have no reference to time. If there were, then, classes of lands which, by law, were reserved from sale so that no officer of the government could, without a violation of law, attempt to sell them, and there were other public lands in relation to which the executive of the United States was already intrusted, by law, with the power to direct the survey and sale, so that no farther authority was needed, we have the key to the right understanding of the words employed in the act of 1815.

The act of 3d March, 1811, 2 Story, 1197, is that which

directs the sale of the public lands, and makes the reservations from sale. It is upon this act, and upon those which establish land-offices in different parts of Missouri, and refer to this for the direction of the different offices, that the sales of land in Missouri have taken place.

The 8th section of this act empowers the President to direct the surveyor-general to cause the public lands in the territory of Louisiana to be surveyed.

The 10th section empowers the President to direct the land, when surveyed, to be offered for sale, and prescribes the duties of the different *officers, when the President has designated the days of sale. This section reserves from sale—1st, a section number 16 in each township; 2d, a tract for the support of a seminary of learning; 3d, salt springs and lead mines, and lands contiguous thereto; 4th, by the proviso to the section, "no tract shall be offered for sale, the claim to which has been in due time, and according to law, presented to the recorder of land-titles in the district of Louisiana, and filed in his office, for the purpose of being investigated by the commissioners appointed for ascertaining the rights of persons claiming lands in the territory of Louisiana." This section authorizes the sale of the mass of public land, and forbids the sale of particular descriptions of land: we have then, the division of the land into the two classes—those the sale of which is authorized, and those the sale of which is not authorized; and the act of 1815 authorizes locations to be made on lands of one class, and not on lands of the other.

*48]

This construction is further sustained by the designation of land, subject to the location, in the present tense: "the sale of which is authorized by law." In 1815, when this law was passed, a very large portion of the land in the territory of Missouri had not been surveyed, so that if the intention of Congress was to make a survey of the public lands a pre-requisite to legal locations, by the use of these words, then, as it was evidently designed to give a range for these locations as extensive as the territory, the language employed, instead of being "the sale of which is authorized by law," would have been, the sale of which is or hereafter shall be authorized by law.

As the act speaks of the authority then existing by law for the sale of the public land, it evidently excludes the idea that the sale was only authorized when the President had issued his proclamation for the sale: for at that time the President had never issued any proclamation for any sale in the territory of Missouri.

The other interpretation of these words will, as I believe, be

considered as expressing the meaning of Congress; that is, that they refer to the two classes of land, one of which was then authorized by law to be sold, and the other was expressly, by law, reserved from sale.

I am aware that great reliance has been placed on the official opinions of Mr. Wirt, when he was attorney-general, given in relation to these locations, and also upon the opinion of Mr. Butler, given upon this very claim of Mackay, after its confirmation, and upon the opposing claim. These were, certainly, gentlemen eminent in the profession, whose opinions are entitled to high consideration, but still they are not conclusive authority.

I have but a single remark to make upon Mr. Butler's opinion, and that is, that he is totally mistaken as to a cardinal fact in the case. He assumes that Mackay's claim was filed and recorded according to law, so that the land was expressly reserved from sale by *the 10th section of the [*49 act of 1811, and that therefore it was not subject to location. Now, if Mr. Butler had read the petition on which the confirmation was procured, he would have seen it there stated, that the claim had never been filed nor recorded according to law, and that, therefore, the land was not only by law public land, but that it was not, and never had been, reserved from sale.

On the opinion of Mr. Wirt, I have to remark, that he appears to have fallen into the mistake of supposing, that the notice or application of the party for a location was the location itself, and to have directed his arguments chiefly against that instrument. It is true, that Mr. Wirt argues against surveys made under New Madrid certificates which did not conform to the lines of the public surveys; but it is to be observed, that this conformity to the public surveys is nowhere required in the law which regulates these locations; and although it may be very convenient, and be very consistent with the general purposes of the government, in maintaining regular subdivisions of the public lands, it is nowhere required as necessary to the validity of a location.

The effect produced by the opinions of Mr. Wirt was the passage of the act of 26th April, 1822, 3 Story, 1841, which directed, that locations made under these certificates, if made in pursuance of the provisions of the act of 1815 in other respects, should be perfected into grants, in like manner as if they had conformed to the sectional or quarter-sectional lines of the public surveys, and the sales of the fractions made by such locations should be as valid against the United States as

if the fractions had been made by rivers or other natural obstructions.

The great argument of Mr. Wirt against the locations which were made before the public surveys was, that they would not conform to the legal subdivision of the public lands, when they should be surveyed, and thus confusion would be introduced into the system. Now, this act of 1822 takes the location as made, and the confusion as existing; and directs the issuing of patents, notwithstanding this want of conformity to the lines of sections.

Yet it is argued, that because this act ratifies the locations which do not conform to the public surveys, only when they are, in other respects, in pursuance of the act of 1815, the objection still is to be made, that they were made on land which was not surveyed, and the sale of which was consequently not authorized by law.

This is only coming back again to the discussion of what lands were authorized to be sold; which, I think I have shown, was all not reserved from sale. It is beyond dispute that the land in controversy was not reserved from sale.

But what is the real extent of the objection we are considering? It is this: applications were made to locate portions of the public lands before the public surveys; locations *50] have been so made, and they do not conform to the sectional lines, when they have been *afterwards run. The act of Congress declares that this shall be no objection to the locations, yet it is agreed now, that although the act has waived all objection to the result produced, it still retains the objection to the cause which produced it; so that, substantially, the act has accomplished nothing, and the United States, although they have sold the surrounding fractions, and have waived all objection to the want of conformity in the location to sectional lines, and have patented the land as located, may still, in all cases where the applications were made before the public surveys, come in and claim the land; or, that an intruder or trespasser on the land which the government has thus patented, may show that the application for the location of the land was thus made before the public surveys, and set up the pretence that the patent is void.

This case would present some most remarkable features, if such an objection could prevail.

Here is an application for the location of a tract of land, bounded on three sides by known Spanish surveys, and to run to a point in the line of another Spanish survey. The only new line to be run is that on one side, which is necessary to fix the quantity. A survey is made under that application

calling for the townships and ranges, which shows that the survey was not made before the United States' surveys. A patent is issued by the government, and in a suit brought by a purchaser under that patent it is objected, not that the land was reserved from sale—not that location could have been differently made if the government surveys had been a thousand times run—not that it does not conform to boundaries which would have fixed its limits whenever it might have been made, (seeing that it is bounded on three sides by established Spanish surveys,) but that the application was made prior to the public surveys, therefore the application was void, and the survey was void, and the location was void, and the patent was void, and but for Mackay's confirmation, the land would be mere vacant, unappropriated land; and though an owner of part of the land, under the Lafleur patent, has been more than twenty years in possession under the title of Lafleur, he has all the time been a mere trespasser!

The cases in which the validity of patents have been examined in suits at law, are too familiar to the court to need any extended remark from the counsel. From the case of *Polk's Lessee* v. *Wendell*, to the present time, the principles upon which patents have been adjudged void, have been where the state has not had title to the land granted; where the officer had no authority to issue it; where the land has been appropriated by a species of title which could not by law appropriate it; where the patent has issued against some express prohibition of law, or for land reserved from the disposition of it attempted by the patent. The patent to Lafleur is within neither of these classes. The whole of the objections now made to it would be answered to the satisfaction of the plaintiff in error, if the deputy *surveyor in 1823 had run around the same [*51 lines which were run in 1818, and then had sat down and made precisely the same plat, and the same field-notes. And how is it known that he did not? The purchaser under Lafleur gave no evidence about a survey. The survey of 1818 was given in evidence to impeach the patent; the patent itself implies that all was done which was necessary to its being regularly issued.

I really feel that I would be trifling with the court to make a more extended argument in the case.

The propositions I maintain are the following:—

1. That upon this record the Mackay title commences, as against the defendant in error, with the confirmation, as no document is shown anterior to that confirmation; and the confirmation does not, as against the defendant in error, establish the existence of any prior claim.

2. That if the existence of a genuine Spanish order of survey should be assumed, as against the defendant in error, all claim under it was barred by the acts of Congress.

3. That if the existence of such order of survey should be assumed, whether the claim under it were barred or not, the confirmation of the claim is, by the act under which it was obtained, expressly postponed to the Lafleur title.

4. That the patent of Lafleur is the better legal title, unless there is some defect that renders the patent void.

5. That the Lafleur title is above exception, regular, and effectual.

Mr. Justice CATRON delivered the opinion of the court.

The first question in order is, whether the patent to Lafleur is a valid title as against the United States, when standing alone.

By the certificate of the recorder of land-titles at St. Louis, Lafleur was entitled to 640 acres of land in compensation for lands of his injured by the earthquake in New Madrid county. On this, the survey of April, 1815, is founded. Its return by the surveyor, with a notice of location, to the office of the recorder, was the first appropriation of the land;[1] and not the notice to the surveyor-general's office requesting the survey to be made, as this court held in *Bagnell* v. *Broderick*, 13 Pet., 450.

Township 45, in which the land granted to Lafleur lies, was laid off into sections in 1817, and 1818; and we suppose before the survey for Lafleur was made, as his patent, and the survey on which the patent is founded both refer to the township by number as including the land. When the return of the township survey was made to the surveyor-general's office does not distinctly appear, although it is probable it was after Lafleur's location had been made with the recorder.

*52] The location was in irregular form, and altogether disregarded the *section lines, and ordinary modes of entry under the laws of the United States. This circumstance lies at the bottom of the controversy. The general land-office at Washington refused to issue a patent on New Madrid locations thus surveyed. The Secretary of the Treasury on the 11th of May, 1820, and again on the 19th of June, 1820, called on the attorney-general for his opinion on the validity of such locations, (2 Land-Laws and Opinions, 9, 10,) this officer replied—"That the authority given is, to make these

[1] FOLLOWED. *Rector* v. *Ashley*, 6 Wall., 150; *Frisbie* v. *Whitney*, 9 Id., 197; *Maydray* v. *Easton*, 11 Id., 633.

locations on any of the public lands of the territory, the sale of which is authorized by law; but the sale is not authorized by law until the sectional lines are run, and consequently all locations previously made by these sufferers are unauthorized."

To cure this defect, the act of 1822 was passed, which provides, that locations made before that time, under the act of 1815, if made in pursuance of the act in other respects, should be perfected into grants in like manner as if they had conformed to the sectional and quarter-sectional lines of the public surveys; and that the fractions previously created by such locations should be deemed legal fractions, subject to sale: But that after the passing of the act, (26th April, 1822,) no location of a New Madrid claim should be permitted that did not conform to the sectional and quarter-sectional lines. The opinion of the attorney-general appears to have been favorable to locations in conformity to the public surveys actually made, before their return; until returned however, and received at the surveyor-general's office, they could not be recognized as legal public surveys; and in this sense Congress obviously acted on the opinion, and course of the general land-office, in pursuance of it.

The principal difficulties standing in the way of issuing patents, seem to have been the following: There were New Madrid locations made on lands not then surveyed; locations made after the lands had been surveyed, but before the surveys were returned; and locations made on lands surveyed, and the surveys returned; in each case, disregardful of the section lines. But all of them were on lands that had been surveyed, and the surveys duly returned and sanctioned, when the act of 1822 was passed. On this state of facts Congress acted. No distinction was made among the claimants; all fractions created by prior locations, in existing public surveys, were declared legal, and subject to sale; the fractions produced, could not be legal unless the locations producing them were equally so: In this respect, therefore, such locations were binding on the United States from the date of the act. It is insisted, however, that until section No. 45 had been offered for sale by the proclamation of the President, no entry could be made on it by a New Madrid warrant; and in this respect Lafleur's location was void before, and not cured by, the act of 1822, but expressly excepted: that Congress only acted on one defect, that of disregarding the sectional lines, and excluded all others. Township No. 45 was first advertised for sale in 1823.

*In addition to what has been said in answer to the argument, it may be remarked, that the New Madrid [*53

sufferers were preferred claimants; like others having a legal preference, they had a right to buy, so soon as the officers of the government had by law the power to sell; and sales could be made founded on public surveys. It could not have been intended by Congress that the sufferer should surrender his injured claim, get his warrant from the recorder, and then be compelled to wait until after the public sale, which might sweep all the lands out of which he could obtain a new home. And so the act of 1815 was construed and acted on at the general land-office. No objection seems to have been made there on the ground that these claims had been entered on lands not previously offered for sale at auction; as the President might, or might not order the sale. We think this plainly inferrible from the following order. On the 9th of April, 1818, an act was passed limiting applications to the recorder, for New Madrid warrants of survey, to the 1st of January, 1819. The commissioner of the land-office here, wrote to the recorder at St. Louis, enclosing a copy of the act, a few days after it was passed, saying:

"This act authorizes the reception of claims to the 1st of January next; but as several public sales will take place previous to that day, you must not issue any patent certificates to those claimants after the commencement of such sales, unless the claimant produces a certificate from the register of the land-office to show that the land has not been sold. Should you issue any patent certificate to those claimants previous to the public sales, you will furnish the register of the land-office for the district in which the lands lie with a list of the tracts for which you have issued patent certificates, that he may reserve them from sale."

The 3d section of the act of 1815 makes it the duty of the recorder to deliver to the claimant a certificate stating the circumstances of the case; that is, that the claim had been allowed, surveyed, and recorded in due form, and that he was entitled to a patent for the tract designated: this was to be filed with the recorder if satisfactory to the claimant. Then the recorder was bound to issue the "patent certificate," above spoken of, in favor of the party, which, being transmitted to the commissioner of the general land-office, entitled the claimant to a patent from the United States.

By the foregoing instructions, patent certificates, previous to the public sales, were contemplated as due to claimants for lands entered but not previously offered for sale; and we cannot doubt did exist in large numbers. They, of course, were sanctioned at the land-office. Nor is the consideration of this question presented to this court for the first time. Pettier's

claim, in the case of *Stoddard* v. *Chambers*, 2 How., 317, was like this in all its features except one. It had been located on the same land covered by Bell's concession made by the Spanish government, which had been filed and *re- [*54 corded in 1808, but not recommended for confirmation by the commissioners at St. Louis, for want of occupation and cultivation. By the act of 1811, until the decision of Congress was had, the land covered by the Spanish claim could not be offered for sale, and this restriction was continued. Pettier's New Madrid location was made in 1818, on the land reserved from sale in favor of Bell's concession, and this court held the New Madrid location, and the patent founded on it, void, because the sale of the land "was not authorized by law," and the title of Pettier in violation of the act of 1815. But the court says:—"Had the entry been made or the patent issued after the 20th of May, 1829, when the reservation ceased, and before it was revived by the act of 1832, the title of the defendant could not be contested."

For the reasons assigned, the court was of opinion Pettier's claim would have been valid, had Stoddard's not been interposed. It also lies in township No. 45. So our opinion is, that Lafleur's claim was rendered valid by the act of 1822, unless it can be overthrown by the interposition of Mackay's.

2. This raises the inquiry into its validity in opposition to Lafleur's. That, standing alone, Mackay's was valid against the United States, is in effect decided by this court in *Pollard* v. *Kibbe*, 14 Pet., 355, and *Pollard* v. *Files*, 2 How., 601, and is free from doubt.

Lafleur's location was made in 1818, and his patent issued in 1827. Mackay's claim was first filed for adjudication before the District Court (U. S.) of Missouri in 1829. Up to this date it had stood as an incomplete claim, requiring confirmation by this government before the title could pass from the United States; to accomplish which a decree in its favor was sought in the District Court, and finally obtained here on appeal; in conformity to which a patent was obtained.

As the proceeding under the act of 1824 was *ex parte*, Lafleur was not bound by it any further than the legislation of Congress affected his rights; and the question is, how far were they protected, as against incomplete titles brought before the District Court.

By the act of March 2d, 1805, sec. 4, certain French and Spanish claimants were directed, on or before the 1st day of March, 1806, to deliver to the register of the land-office, or recorder of land-titles, within whose district the land might lie, every grant, order of survey, deed, conveyance, or other

written evidence of claim, to be recorded in books kept for the purpose. "And if," says the act, "such person shall neglect to deliver such notice in writing of his claim, or cause to be recorded such written evidence of the same, all his right, so far as the same is derived from the two first sections of this act, shall become void, and for ever thereafter be barred; nor shall any incomplete grant, warrant, order of survey, deed of conveyance, or other written evidence, which shall not be
*55] recorded as above directed, ever after be considered or admitted as evidence, in any *court of the United States, against any grant derived from the United States."

By the act of April 21, 1806, sec. 3, supplemental to the act of 1805, the time for filing notices of claims and the evidence thereof, was extended to the first day of January, 1807: but the rights of such persons as shall neglect so doing within the time limited by the act, it was declared should be barred, and the evidence of their claims never after be admitted as evidence; in the same manner as had been provided by the 4th section of the act to which that was a supplement.

By the 5th section of the act of March 3, 1807, further time for filing notices and evidences of claims was given till the 1st day of July, 1808: But all benefit was cut off from the claimant, if he failed to give notice of his claim, and file his title papers; so far as the acts of Congress operated in giving the title any sanction through the agency of commissioners—and ever after the first of July, 1808, the claim was barred.

It is insisted, however, Mackay's claim is not embraced by the act of 1805, and to which the acts of 1806 and 1807 refer. The act of 1805 does govern the future legislation, interposing a bar. By section 4, French or Spanish grants made and completed before the 1st day of October, 1800, might, or might not, be filed; as the treaty of 1803 confirmed them, they needed no further aid: But complete grants issued after the 1st day of October, 1800—and incomplete titles, bearing date after that time, "shall be filed," says the act. Mackay's claim is of neither description; it was an incomplete title; being a permit to settle and warrant of survey, without any settlement or survey having been made; but dated before the 1st of October, 1800.

The act of 1805, section 4, further provides, that every person claiming lands by virtue of the two first sections of that act, should, by the 1st day of March, 1806, file his notice of claim, title papers, &c., otherwise the claim should be barred. Mackay's claim "was a duly registered warrant of survey," within the words of the 1st section of the act. That the United States had the power to pass such a law we think free

from doubt; it being analogous to an ordinary act of limitation, as this court held in *Strother* v. *Lucas*, 12 Pet., 448, to which nothing need be added here.

As to the United States, and all persons claiming under them, Mackay's claim stood barred from the 1st of July, 1808, until the passing of the act of May 26, 1824, by which the bar was removed so far as the government was concerned. The time for filing claims under this act was extended by another passed in 1826, and again by that of May 24, 1828, to the 26th day of May, 1829; before the expiration of which time Mackay's claim was filed in the District Court (U. S.) of Missouri, and eventually confirmed in this court on appeal: And the question is, did the acts of 1824, and 1828, and *the [*56 proceeding had under them, affect Lafleur's title. By the 11th section of the act of 1824, it is provided, "That if in any case it shall so happen, that the lands, tenements, or hereditaments decreed to any claimant under the provisions of this act, shall have been sold by the United States, or otherwise disposed of, it shall be lawful for the party interested to enter the like quantity of lands, in parcels conformable to sectional divisions and sub-divisions, in any land-office in the state of Missouri."

The act of 1828, to continue in force the act of 1824 for a limited time, and to amend the same, declares (in section 2)— "That the confirmations had by virtue of said act, and the patents issued thereon, shall operate only as a relinquishment of title on part of the United States, and shall no wise affect the right or title, either in law or equity, of adverse claimants of the same land."

The foregoing are the conditions on which the bar was removed; these Congress certainly had right to impose, and thereby give a preference to an intervening title acquired during the existence of the bar.

Lafleur was a claimant with a good title in equity, when the act of 1824 was passed; this he well might perfect into a patent, as his equity was expressly protected by the act of 1828, and by implication in that of 1824, (section 11;) neither the patent or entry was affected by the proceedings had on Mackay's claim in the District Court of Missouri, and in this court; nor by his patent issued pursuant thereto: It follows Lafleur's is the better title, and that the decision of the Supreme Court of Missouri must be affirmed.

Mr. Justice McKINLEY.

I dissent from the opinion of the majority of the court, in this case, for the following reasons

First. According to the act of the 17th of February, 1815, chap. 198, "persons owning lands in the county of New Madrid, in the Missouri territory, with the extent the said county had on the 10th day of November, 1812, and whose lands have been materially injured by earthquakes, shall be, and they are hereby authorized to locate the like quantity of land on any of the public lands of said territory, the sale of which is authorized by law." The section lines of the land had not been run on the 7th of July, 1817, when the location on the New Madrid certificate, under which Gamble claims, was made. The sale of the land, including this location, was not authorized by law, until the year 1823. The 1st section of the act of the 26th April, 1822, chap. 40, could not have legalized the location, because the land was not then subject to sale; and because that section only authorized grants to issue in like manner, as if the location had conformed to the sectional or quarter-sectional lines of the public surveys, if made in other respects, in pursuance of the act of the 17th of February, 1815. Now as the location had not been *made in pursuance of that act; and as the 2d section of the act of the 26th of April, 1822, declared "That hereafter the holders and locators of such warrants shall be bound, in locating them, to conform to the sectional and quarter-sectional lines of the public surveys, as nearly as the respective quantities of the warrants will admit, and all such warrants shall be located within one year after the passage of this act; in default whereof the same shall be null and void;" and as no location and survey were made in conformity with the 2d section, the warrant, survey, and patent, are utterly void. See *Lindsey* v. *Miller*, 6 Pet., 675.

*57]

Secondly. The decree confirming the claim of Mackay's heirs, by the Supreme Court of the United States, under the treaty, was a full and ample admission, that the United States had no right to the land covered by that claim. The title which they acquired to this land, under the treaty, was, therefore, held by them in trust for Mackay's heirs, or any other person having a better title, under the treaty. The decree of confirmation related back to the date of the concession, by the Spanish government, to Mackay, and made the title as complete as if it had been completed by that government before the treaty, notwithstanding the several intervening acts of limitation passed by Congress.

Thirdly. The location, survey, and patent, under which Gamble claimed, being void, the 11th section of the act of the 26th of May, 1824, chap. 173, did not apply to this case.

Because, in the language of the section, it did not "so happen that the land" had been sold or otherwise disposed of by the United States. Therefore, Mackay's heirs, or those claiming under them, were not authorized, and much less bound to enter other land in lieu of that confirmed and granted to them by the decree and patent.

Mr. Justice STORY and Mr. Justice WAYNE concur in these reasons.

JAMES N. AND LEVI DICKSON, PLAINTIFFS, *v.* WILLIAM H. WILKINSON, ADMINISTRATOR OF JOHN T. WILKINSON, DECEASED.

There was a judgment against an administrator of assets *quando acciderint*.
Upon this judgment a *scire facias* was issued, containing an averment that goods, chattels, and assets had come to the hands of the defendant.
Upon this *scire facias* there was a judgment by default; execution was issued, and returned "*nulla bona*."
A *scire facias* was then accorded against the administrator to show cause why the plaintiff should not have execution "*de bonis propriis*."
It was then too late to plead that the averment in the first *scire facias* did not state that assets had come into the hands of the administrator subsequent to the judgment *quando*.
A judgment by default against an executor or administrator is an admission of assets to the extent charged in the proceeding against him.[1]
If a party fail to plead matter in bar to the original action, and judgment pass against him, he cannot afterwards plead it in another action founded on that judgment; nor in a *scire facias*.[2]
A demurrer reaches no further back than the proceedings remain in *fieri*, or under the control of the court.

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[1] In *Mason* v. *Peter*, 1 Munf. (Va), 437, it was held that a judgment against the executor by default is a *prima facie* admission of assets, but no evidence against the heir or devisees of the real estate. *Freelands* v. *Royal*, 2 Hen. & M. (Va.), 575; *Moster* v. *Zimmerman*, 5 Humph. (Tenn.), 62, (changed by statute); *Skelton* v. *Hawlings*, 1 Wils., 258; *Wharton* v. *Richardson*, 2 Str., 1075; *Eyre* v. *Hinton*, Id., 732; *Cook* v. *Jones*, Cowp., 727; *Post* v. *Mackall*, 3 Bland (Md.), 486. So after a confession of judgment by an executor in an action brought on his bond, for the purpose of recovery against him and his sureties for a devastavit, he cannot resort to a court of equity for relief, on the ground that he had fully administered the assets of his testator. *Worsham* v. *McKenzie*, 1 Hen. & M. (Va.), 342; *Platt* v. *Robins*, 1 Johns. (N. Y.) Cas., 278. It is an admission of assets. *Williams* v. *Holden*, 4 Wend. (N. Y.), 223; *Lawrence* v. *Bush*, 3 Id., 305; *Ruggles* v. *Sherman*, 14 Johns. (N. Y.), 446.

After allowing judgment to go by default, an administrator cannot plead *plene administravit*, for it is a confession of assets. *Executor of Baracliff* v. *Administrators of Griscom*, 1 Coxe (N. J.), 165.

In South Carolina, it is held that a court of equity will relieve him of the judgment. *Lenoir* v. *Winn*, 4 Dev. (S. C.), 65; but not in Maryland. *Dorsey* v. *Hammonet*, 1 Bland (Md.), 463; *Elliott* v. *Welch*, 2 Id., 242. So judgment upon demurrer has the same effect. *Rock* v. *Leighton*, 2 Salk., 310; S. C. 1 Ld. Raym., 589; Comyns, 87; *Erving* v. *Peters*, 3 T. R., 685; *Leon-*

Dickson *v.* Wilkinson.

THIS case came up from the Circuit Court of the United States for the middle district of Tennessee, upon a certificate of division in opinion between the judges.

All the facts which are necessary to an understanding of the point are stated in the certificate, as follows:—

The plaintiffs, at September term, 1837, with the defendant's consent, had a judgment of assets *quando acciderint*. On the 2d of October, 1838, upon their suggestion of assets come to the defendant's hands, a *scire facias* was accorded them to be made known to the defendant to show cause why they should not have execution of those assets. This *scire facias* was issued on the 10th of January, 1839, and after reciting the judgment *quando*, it contained the following, and no other, averment of the coming of assets to the defendant's hands:— "And whereas, afterwards, to wit, on the 2d day of October,

ard v. *Simpson*, 2 Bing. N. C., 176; S. C., 2 Scott, 355.

So a verdict upon any plea pleaded by an executor or administrator, except *plene administravit*, is conclusive upon him that he has assets to satisfy such judgment. *Ramsden* v. *Jackson*, 1 Atk., 292; *Erving* v. *Peters*, 3 T. R., 385; *Hancock* v. *Prowd*, 1 Saund., 335, note 10. If he suffers judgment to go against him, his sureties are liable. *Newcomb* v. *Goss*, 1 Metc. (Mass), 333; and *plene administravit* is not a good plea to such an action. *Judge of Probate* v. *Lane*, 50 N. H., 556.

In an early case in Tennessee it was held that if a judgment is rendered against an executor in another state, if he did not plead fully administered in that suit, he cannot have the benefit of the plea in Tennessee, but is liable to a judgment *de bonis propriis*. *White* v. *Archbill*, 2 Sneed, (Tenn.), 588.

In many states and in England the rule is changed as stated in the case, and the administrator or executor is not liable on his bond for the amount of the judgment except as to such assets as come into his hands, and then, in case of an insufficiency, only the proportionate amount due on the judgment. *Cousins* v. *Paddon*, 2 Cromp. M. & R., 558; *Re Higgins' Trusts*, 2 Giff., 562; *Colman* v. *Hall*, 12 Mass., 570; *Lee* v. *Gardner*, 26 Miss., 521; *Judy* v. *Kelley*, 11 Ill., 211.

[2]A failure to plead any matter in bar of an action is a waiver of that particular defense, and it cannot be afterwards urged in a second action concerning the same subject matter. This is particularly true in an action on the judgment rendered on the original cause of action. In accordance with the rule stated, it was held in *Wilson* v. *Hunt*, Pet. C. C. 441, that a payment which might have been pleaded to the original *scire facias* to revive a judgment, could not be given in evidence on a second *scire facias*; and in *United States* v. *Thompson*, Gilp., 614, it was held that where a *scire facias* is issued to revive a judgment, the defendant cannot avail himself of matters of defense which occurred previous to the original suit. It is a general rule, that, to a defendant in *scire facias*, no ground of defense is open, which he might not have taken in the original suit. *Smith* v. *Eaton*, 37 Me., 298; *Robbins* v. *Bacon*, 1 Root (Conn.), 548; *Sigourney* v. *Stockwell*, 4 Metc. (Mass.), 518, 521; *Kemp* v. *Cook*, 6 Md., 305; *McFarland* v. *Irwin*, 8 Johns. (N. Y.), 77; *Earle* v. *Hinton*, 2 Str., 732; *Bush* v. *Gower*, Id., 1043; *Moore* v. *Garretson*, 6 Md., 444; *Matthews* v. *Mosby*, 13 Sm. & M. (Miss.), 422; *Person* v. *Valentine*, Id., 551; *Riley* v. *McCord*, 24 Mo., 265. But any matter arising subsequent to the rendition of the judgment sought to be revived, may be pleaded as a defense. *Vredenburgh* v. *Snyder*, 6 Iowa, 39.

1838, it was suggested to the said court, on behalf of the said plaintiffs, that goods, chattels, and assets had come to the hands of the defendant, sufficient to satisfy the said judgment; and it was thereupon ordered by said court, that a *scire facias* issue, and we therefore hereby command you, &c." This writ was made known to the defendant, and the plaintiffs thereupon, by his default, at September term, 1839, had judgment of execution of the intestate's goods in the defendant's hands to be administered, if so much, and if not, then the costs *de bonis propriis*. On the 9th of October, 1839, execution was issued accordingly, and returned to March rules, 1840, *nulla bona*, except as to the costs, which were levied *de bonis propriis*. A *scire facias* was now accorded against the defendant to show cause why the plaintiffs should not have execution of their demand *de bonis propriis:* and this writ was issued, made known to the defendant, and returned to September term, 1840, when he appeared and pleaded to it fully administered, and a special plea, that the insolvency of the intestate's estate had been suggested to the proper Tennessee authority, and a bill in equity filed in a state court to administer his effects according to the laws of Tennessee. To these pleas the plaintiffs demurred, and on the argument of the demurrer, the defendant's counsel, against awarding execution *de bonis propriis*, showed for cause, that the judgment by default upon the first *scire facias* did not establish the fact, that any goods, &c., had come to the defendant's hands since the judgment of assets *quando acciderint*, because the said first *scire facias* did not aver that goods, &c., had come to the defendant's hands since the said judgment *quando*, but only that those goods had come to his hands, without saying when, and a judgment by default only admits such facts as are alleged; *that unless the record showed that assets had come to his [*59 hands since the said judgment *quando*, and that such assets had been eloigned and wasted, no execution could issue against the defendant to be levied *de bonis propriis*. And the counsel for the plaintiffs insisted that advantage should have been taken of the alleged defect in the first *scire facias* at the term to which it was returnable, and returned, by plea or demurrer; that the judgment by default was a waiver of errors in the process, and so that the said error, if it be one, could not be reached by the demurrer aforesaid.

"And upon said point, whether advantage could be taken of the aforesaid defective averment in the first *scire facias*, upon the plaintiff's demurrer to the defendant's pleas to the second *scire facias*, the opinions of the judges are opposed.

"And it is thereupon ordered, that the foregoing statement

of facts, involving said point, upon which said disagreement occurs, made under the direction of the judges, and at the request of the plaintiffs by their attorney, be certified to the Supreme Court for their opinion upon said point, according to the act of Congress in that case made and provided."

The case was argued by Mr. *Francis Brinley*, for the plaintiffs, who made the following points:—

1. The first *scire facias* was sufficiently accurate as to form. It avers that on the 4th of September, 1837, judgment was rendered for the plaintiffs against the assets *quando acciderint*. It then avers that afterwards, on the 2d of October, 1838, (more than a year,) the plaintiffs suggested that assets had come into the hands of the defendant, sufficient to satisfy the judgment. These two facts together form the connected proposition, that assets had come into the hands of the defendant since the judgment *quando*. In the case of *Platt* v. *Robins et al.*, 1 Johns. (N. Y.), Ch., 276, there is no better averment; yet no objection was taken to the form. "Diverse goods and chattels which were of the intestate, to the amount of the damages recovered had come to the hands of the defendants," is the language in that case.

2. If the averment in the first *scire facias* be imperfect, the objection cannot now be taken; it should have been made by plea, when that writ was returnable. The general rule is, that if a party do not avail himself of the opportunity of pleading matter in bar to the original action, he cannot afterwards plead it, either in another action founded on it, or in a *scire facias*. *Cook* v. *Jones*, 2 Cowp., 727; *Wheatley* v. *Lane*, 1 Saund., 216, note 8, by Williams.

3. The defendant cannot plead any plea to the second *scire facias* which puts his defence upon the want of assets; for such plea would be contrary to what is admitted by his default in the first *scire facias*. The default is an admission of assets. *Treil* v. *Edwards*, 6 Mod., 308; *Rock* v. *Leighton*, 1 Salk., 310; *Platt* v. *Robins et al.*, 1 Johns. (N. Y.), Ca., 276; *Skelton* v. *Hawling*, 1 Wils., 258; *Ruggles et al.* v. *Sherman*, 14 Johns. (N. Y.), 446; *The People* v. *The Judges of Erie County*, 4 Cow. (N. Y.), 446. This last case shows the practice to be to issue execution *de bonis propriis*, whether *nulla bona* or *devastavit* be returned by the sheriff. *Iglehart* v. *Slate, for the use of Mackabin*, 2 Gill. & Johns. (Md.), 235; *Griffith* v. *Chew*, 8 Serg. & R. (Pa.), 17. A *cognovit actionem*, by executor, is an admission of assets. *Den* v. *De Hart*, 1 Hals (N. J.), 450.

4. The point raised by the special plea is as to the effect of

the proceedings in insolvency in the local courts. If the proceeding be in the nature of a commission of insolvency, then the pendency of such commission is no bar to a *scire facias* against the administrator, in a judgment had against him. *Hatch* v. *Eustis*, 1 Gall., 160.

Mr. Justice McKINLEY delivered the opinon of the court.

This case is brought before this court upon a certificate of division of opinion of the Circuit Court for the middle district of Tennessee.

The plaintiffs had judgment against the defendant for $1169.88 debt, and $110.94 damages. "And it appearing to the satisfaction of the court, by the admission of the plaintiffs, that no assets of the intestate had come to the hands of the defendant," it was adjudged, that the plaintiffs have "execution to be levied of the goods and chattels, and assets, which might thereafter come to the hands of the defendant to be administered." Upon this judgment a *fi. fa.* issued to be levied of the assets of the testator, which might thereafter come to the hands of the defendant to be administered: which *fi. fa.* was returned by the marshal *nulla bona.* On the 10th day of January, 1839, a *scire facias* issued against the defendant, upon suggestion that assets of the intestate, sufficient to satisfy the judgment, had come to the hands of the defendant. Upon this *scire facias* there was judgment against the defendant by default, to be levied of the goods and chattels of the intestate, in his hands to be administered. A *fi. fa.* issued upon this judgment, which was also returned *nulla bona.*

And thereupon another *scire facias* issued against the defendant to have judgment against him *de bonis propriis*, to which he pleaded, first, *plene administravit;* secondly, that no assets ever came to his hands; and thirdly, that the estate of the intestate was insolvent at the time the letters of administration were granted; and that in pursuance of the act of the General Assembly in such case made and provided, he had suggested, to the clerk of the county court, the insolvency of said estate, &c. To these pleas the plaintiffs demurred, and in argument the counsel for the defendant insisted "that the judgment by default upon the first *scire facias* did not establish the fact, that any goods, &c., had come to the hands of the defendant, since the judgment of assets *quando acciderint;* because the said first *scire facias* did not aver, that goods, &c., had come to the defendant's hands since the said judgment *quando;* but only, that said *goods, &c., had come [*61 to his hands, without saying when; and a judgment by default only admits such facts as are alleged. That unless the record

showed that assets had come to his hands since the judgment *quando*, and that such assets had been wasted, no execution could issue against the defendant to be levied *de bonis propriis*." And the counsel for the plaintiffs insisted "that the alleged defect, in the first *scire facias*, should have been taken advantage of at the first term to which it was returnable, by plea or demurrer; that the judgment by default was a waiver of errors in the process; and so the error, if it be one, could not be reached by the demurrer."

"And upon said point, whether advantage could be taken of the aforesaid defective averment in the first *scire facias*, upon the plaintiff's demurrer to the defendant's pleas to the second *scire facias*, the opinions of the judges were opposed."

A *scire facias* is an action to which the defendant may plead any legal matter of defence. And in this case the defendant might have pleaded the same matter in bar to the first *scire facias*, which he offered to plead to the second. Or if he considered the first *scire facias* insufficient in law, he might have demurred to it. Having done neither, judgment by default was properly taken against him. And it is well settled, that a judgment by default against an executor, or administrator is an admission of assets to the extent charged in the proceeding against him, whether it be by action on the original judgment or by *scire facias*. *Ewing's Executors* v. *Peters*, 3 T. R., 685; *The People* v. *The Judges of Erie*, 4 Cow. (N. Y.), 446. Failing to make the money out of the assets of the intestate, on the first *scire facias*, the plaintiffs prosecuted the second to have judgment against the defendant, to be levied of his own proper goods, &c. To this he pleaded the three pleas before mentioned.

It is a universal rule of law, that if the party fail to plead matter in bar to the original action, and judgment pass against him, that he cannot afterwards plead it in another action founded on that judgment; nor in a *scire facias*, (see the authorities above cited.) The demurrer of the plaintiffs to the defendant's pleas was, therefore, well taken. And although either party may, on a demurrer, take advantage of any defect or fault in pleading, in the previous proceedings in the suit, the demurrer can reach no further back than the proceeding remain *in fieri*, and under the control of the court. The judgment on the first *scire facias*, although ancillary to the original judgment, and the foundation of the proceeding on the second *scire facias*, was, nevertheless, a final judgment, and, in that count, conclusive upon the parties; and opposed an insuperable bar to any plea of either party, whether of law or of fact, designed to go beyond it.

It is the opinion of this court, therefore, that advantage could not be taken of any defective averment in the first *scire facias*, upon the demurrer of the plaintiffs to the pleas of the defendant; which is ordered to be certified to said Circuit Court.

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*JOHN WALKER, PLAINTIFF IN ERROR, *v.* THE PRESIDENT AND DIRECTORS OF THE BANK OF WASHINGTON, DEFENDANT IN ERROR. [*62

Every subsequent security, given for a loan originally usurious, however remote or often renewed, is void.[1]

Where there was an application to a bank for a discount upon a note, to be secured collaterally, and the party applying drew checks upon the bank which were paid before the note was actually discounted; and the bank treated the note, when discounted, as having been so on the day of its date instead of a subsequent day on which its proceeds were carried to the credit of the party, it was held not to be usury.[2]

The court below was right in refusing an instruction to the jury that, upon such evidence, they might presume usury as a fact.

In cases of a written contract, the question of usury is exclusively for the decision of the court.[3]

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[1] FOLLOWED. *Nelson* v. *Hurford*, 11 Neb., 467.

If the original transaction was usurious, every renewed security is tainted with the original illegal transaction. *Orr* v. *Lacy*, 4 McLean, 243, 248; *Harrison* v. *Hannah*, 5 Taunt., 780; *Bridge* v. *Hubbard*, 15 Mass., 96; *DeButts* v. *Bacon*, 6 Cranch, 252; *Callonan* v. *Shaw*, 24 Iowa, 441; *Dunscomb* v. *Bunker*, 2 Metc. (Mass.), 8.

The assignment of a mortgage to secure such a loan has been held void. *Schroeppel* v. *Corning*, 6 N. Y., 107.

Nor can any subsequent confirmation of a usurious contract render it valid. *Moncure* v. *Dermott*, 13 Pet., 345.

Changing the form of the security as to character, or form, or parties, does not purge the illegal consideration. *Tuthill* v. *Davis*, 20 Johns. (N. Y.), 285.

Nor does taking a mortgage to secure the note formerly given render it valid. *Brinkerhoff* v. *Foote*, Hoffm. (N. Y.), 291; *Ruddock* v. *Boyd*, Id., 294, 306, 308; and property conveyed to secure such a debt is not subject to the lien of a judgment against the grantee. *Harrold* v. *Morgan*, 66 Ga. 398.

It makes no difference that the parties liable on the note were not privy to the usurious bargain, if the true destination of the note was to secure such a bargain made by others for the use of him who was to reap the fruits of the bargain. *Bridge* v. *Hubbard*, 15 Mass., 96; see *Steele* v. *Whipple*, 21 Wend. (N. Y.), 103; *Powell* v. *Waters*, 8 Cow. (N. Y.), 669; *Reed* v. *Smith*, 9 Id., 647; *Vickery* v. *Dickson*, 35 Barb. (N. Y.), 96, 98, 100.

So taking a bond and mortgage for a former usurious bond and mortgage does not render the transaction valid. *McCroney* v. *Alden*, 46 Barb. (N. Y.), 272.

Even though done ignorantly. *Edwards* v. *Skining*, 1 Brev. (S. C.), 548.

[2] APPLIED. *Hotel Co.* v. *Wade*, 7 Otto, 24.

[3] This was decided by Chief Justice Marshall in the early case of *Levy* v. *Gadsby*, 3 Cranch, 180 (1805); and the same rule has been announced in other cases. *Buttrick* v. *Harris*, 1 Biss., 442; *Bank of United States* v. *Waggener*, 9 Pet., 378.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Columbia, in the county of Washington.

The facts were these:

On the 30th of January, 1840, Walker, the plaintiff in error, addressed the following letter to the bank:

"GENTLEMEN:—I am desirous of obtaining a loan of twenty-five thousand dollars, to purchase cattle for fulfilling my contract with the government, for N. York station, say 2,000 barrels, and amounting to nearly $27,000.

"In security for the above money I'll assign all my right and title to the beef now on hand, say barrelled and salted, and all that I may have (reserving a prior right of $3,000, already given for Norfolk station) at the warehouse on Bradley's wharf, to be subject to your control.

"I'll deposit an accepted draft of E. Kane, Esq., navy agent, for the payment of my contract for N. Y. station.

"Y'rs resp'y, JNO. WALKER."

On the 6th of February, 1840, John Walker executed a promissory note in favor of Henry Walker or order, for $10,000, payable ninety days after date, negotiable and payable at the Bank of Washington. This note was delivered to the bank under the circumstances stated in the first bill of exceptions. The note upon which the suit was brought was a renewal of it, dated on the 9th of May, 1840, the maturity of the above.

On the 19th of February, 1840, the following draft was drawn:

"ELIAS KANE, Esq., Navy Agent, Washington, D. C.

"SIR:—Please pay to James Adams, Esq., cashier of the Bank of Washington, or order, the sum of ten thousand dollars, out of the delivery of navy beef, to be made by me at the navy yard, Brooklyn, New York, under my contract, dated 30th September, 1839.

"And oblige, sir, very respectfully, &c., your ob't. serv't.

"JNO. WALKER.

"*Washington, D. C., February* 19, 1840."

*63] *On the face of the foregoing draft was the following acceptance, to wit:

"Accepted, to be paid by me, when the bills shall have been

received and duly approved by the commandant of the navy yard. ELIAS KANE."

On the 20th of February, 1840, Walker executed to the bank a bill of sale of all the beef which he had then on hand or should put up, reciting that he, Walker, stood largely indebted to the bank on loans and discounts obtained from it, and was anxious to secure the payment of notes that had been drawn or given, or might thereafter be drawn or given, &c., &c.

On the 2d of April, 1840, the following draft was drawn, which is referred to in one of the exceptions:

"ELIAS KANE, Esq., Navy Agent, Washington, D. C.

"SIR:—Please pay to James Adams, Esq., or order, the amount due me for delivery of navy beef, to be delivered by me, under my contract, at the navy yard, Brooklyn, New York.

"And oblige, sir, very respectfully, your ob't serv't,

"*April* 2*d*, 1840. JNO. WALKER."

On the face of the above was the following acceptance, to wit:

"Accepted, to be paid by me, when the bills shall have been received and duly approved by the commandant of the navy yard, Brooklyn, New York. ELIAS KANE, Navy Agent."

On the 9th of May, 1840, the following note was executed upon which the suit was brought:

"[$10,000.] *City of Washington, May* 9, 1840.

"Thirty days after date I promise to pay to Henry Walker, or order, ten thousand dollars, for value received. Negotiable and payable at the Bank of Washington. JNO. WALKER."

"Credit the drawer."

It was endorsed by Henry Walker, Lewis Walker, and John Walker.

Not being paid at maturity, suit was brought upon it in May, 1840, and in 1841 the case came on for trial, when the following exceptions were taken, on the part of the defendant.

1*st Bill of Exceptions.*

"At the trial of the above cause, the plaintiffs having given evidence tending to prove the handwriting of the defendant

to the promissory note declared upon, read it in evidence, and then rested.

"Whereupon the defendant then gave evidence, tending to show that the note dated on the 9th of May, 1840, was given in renewal of a previous note dated on the 6th of February,
*64] 1840, similarly signed and endorsed, payable ninety days after date; which said *note, of the 6th of February, 1840, was discounted by the plaintiffs, at the request of the defendant, for his accommodation, as a loan, on the 18th February, 1840, but not passed to his credit until the 22d February, 1840; at which time, last aforesaid, an officer of the plaintiffs deducted from the proceeds of said note the interest on the same, computed from the date of said note, (the 6th February, 1840,) for the period of ninety-four days, and that said note nowhere appeared on the books of the plaintiffs until the 18th February, 1840; that the whole amount credited by plaintiffs to the defendant, as the consideration of said note dated upon the 6th February, 1840, and discounted only upon the 18th February, 1840, and passed to defendant upon the 22d of same month, was the sum of $9,843.33; and that the sum of $156.67 was taken by said plaintiffs, as the interest upon said note, for the time the same was discounted. And further gave evidence, tending to show that the said note of the 6th of February, 1840, was surrendered to the defendant upon the execution of the said note of the 9th of May, 1840, (the said last mentioned note being but a renewal of the former,) and that the said plaintiffs credited the defendant, on account of the said note of the 9th of May, 1840, only the sum of $9,943.33, and took, as interest upon said last named note, the sum of $56.67, which was exacted from said defendant.

"Whereupon the plaintiffs gave evidence, tending to prove that, on the 20th of January, 1840, the defendant had checked out of plaintiffs' bank $1,224.93; that, on the 6th of February, 1840, he had checked out of plaintiffs' bank $2,500; and, on the 21st of February, 1840, he had checked out of said bank to the amount of upwards of $7000; all of which last named sums of money were charged to defendant on the books of the plaintiffs, and no moneys or funds appeared to his credit at the time of drawing out said last mentioned sums of money; and that, on the 22d day of February, 1840, the plaintiffs credited said defendant with $9,843.33, as the proceeds of said note dated the 6th February, 1840; and the balance then appearing to be due to defendant on the books of the plaintiffs, after charging him with the several amounts so as aforesaid drawn out of bank by him previous to the 22d of February, 1840, was

$997.86; which balance was shown to the defendant, and assented to by him.

"The defendant then gave evidence tending to show that the said note, dated 6th February, 1840, was brought, on or after the 11th February, 1840, (it being a discount day,) by the president of the plaintiffs, or a book-keeper of said plaintiffs, to the discount clerk, (the witness,) and given to him as a note not done, or not passed by the board of directors; and that said note remained in the hands of such discount clerk until the 18th February, 1840, when it was passed by the said board; and on the 22d February, 1840, the sum of $9,843.33 was passed to defendant's credit as the net proceeds [*65 *of said note, and that interest, at the rate of six per centum per annum on $10,000, computed from the date of said note, for ninety-four days, was reserved at the time of entering such credit, by direction of some officer of the plaintiffs; and that it was the usual practice of plaintiffs to take interest on discounts only from the time of making the discount; and that it does not appear that defendant was credited on plaintiffs' books with the interest computed from the 6th of February aforesaid.

"The defendant then asked the cashier of the plaintiffs, who was sworn as a witness in said cause, whether the amounts drawn out of bank by the defendant previous to 22d February, 1840, as aforesaid, were not charged on the books of the plaintiffs as overdrafts, and were not allowed as the personal credit of the defendant.

"Whereupon the said cashier answered, that he had no doubt but that the defendant was allowed to check upon said note of 6th February, 1840, before the same was entered to his credit on the books of the bank. And being further asked for the reasons of this opinion by the defendant's counsel, he stated that he had no recollection of said note's being in bank previous to the 18th February, 1840, or of its existence, or of any arrangement with reference to it previous to that date; and that the said amounts, so checked out previous to 22d February, 1840, would not have been paid on defendant's checks, but for the knowledge, on the part of the said cashier, that he (defendant) had a large contract with the Navy Department for the supply of beef, and that for antecedent liabilities the defendant had given to plaintiffs good collateral security; from which, however, no surplus resulted after paying said liabilities; and that the said advances made to the defendant after the 6th February, 1840, and previous to the 22d February, 1840, were made on security given, or to be given; but he does not know of any security given during that time,

except the defendant's letter of 30th January, 1840, a bill of sale, by defendant to plaintiffs, of his barrelled beef, dated 20th February, 1840, and the two acceptances of the navy agent, dated 19th February, 1840, and 2d April, 1840, and the note, dated 6th of February, 1840, of which the said cashier has no recollection, until the 18th of February, 1840; and that he is satisfied that said advances were not made on the personal credit of defendant. And, from all the above circumstances, he has no doubt that said note of 6th February, 1840, was in bank from the time of its date, and that defendant was allowed to check on said note from the day of its date.

"Whereupon the defendant moved the court to instruct the jury that the facts mentioned by said cashier are evidence in said cause, but the inferences or opinions of said cashier are not evidence; but the court refused to give such instructions as prayed, but instructed the jury that the inferences or opin-
*66] ions of said witness are not of themselves evidence of the facts so inferred, but that the facts stated *by the witness as the ground of his inference or opinion, are competent to be given in evidence to the jury, together with the inference or opinion of the said witness; from which facts the jury are to judge whether such inferences and opinion are justified by the facts thus stated. Whereupon the defendant excepts to the said refusal and to the instructions so given, and this, his bill of exceptions, is signed, sealed, and enrolled, this 24th day of December, 1841."

Defendant's 2d Bill of Exceptions.

"After the evidence contained in the aforegoing bill of exceptions had been given, the defendant prayed the court to instruct the jury that, 'if the jury believe, from the evidence aforesaid, that the advances to defendant named in the evidence were not made upon the note of 6th February, 1840, and that the plaintiffs, upon discounting said note, received or reserved more than at the rate of six per centum per annum, then the jury may infer usury, from the whole evidence aforesaid, in said note of 6th February, 1840.' And 'if the jury believe, from the evidence aforesaid, that the note of the 9th of May, 1840, named in the evidence, was given in renewal of a former note of the defendant, dated on the 6th of February, 1840, payable in ninety days after date, and which last note was discounted by the plaintiffs, as a loan to the defendant, on the 18th day of February, 1840, but was not passed to the credit of the defendant until the 22d February, 1840, and that the said plaintiffs then charged and received interest upon the same from the date of the said note, to wit, from the 6th

day of February, 1840, it is the taking above six per centum per annum for the loan of the money made to the defendant upon said note, and is usury; and the defendant is entitled to a verdict in his favor upon said note, notwithstanding the jury may find, from the evidence, that the defendant had overdrawn his account, as stated in the evidence, unless they further find that the said interest, reserved as aforesaid, was credited to defendant's account as a credit to take effect from the 6th February, 1840.' But the court refused to grant each of said prayers, though presented *seriatim*. Whereupon the defendant excepts to the said refusal; and this, his bill of exceptions, is signed, sealed, and ordered to be enrolled, this 24th of December, 1841."

Defendant's 3d Bill of Exceptions.

"In addition to the evidence contained in the foregoing bill of exceptions, which is made part hereof, the defendant gave evidence tending to show that, in October, 1839, the plaintiffs suspended specie payments, and have not, since that time, paid their notes in specie or its equivalent until July, 1841; and further gave evidence tending to prove that the paying teller of the plaintiffs, according to his impression, would not have paid the checks of the defendant for the amounts credited to defendant as aforesaid, on the 22d and 28th *February, [*67
1840, if drawn for the entire amounts in District bank paper or in the plaintiffs' paper, unless he had received special instructions to that effect from the president, or unless he, the paying teller, knew that the plaintiffs were at that time desirous of increasing the circulation of their own notes; that he considered he had a discretion on that subject, in absence of instructions, and has no recollection of having received any instructions in regard to the discounts to defendant, or any general instructions as to the mode of paying discounts at that time, though it is his impression that he would not have paid discounts to so large an amount in District bank paper or plaintiffs' paper at that time; nor would they, at the date of said notes, have received on deposit paper of Virginia banks (they having also suspended at the same time) in large amounts, or to the amount of either of said notes, unless for the accommodation of a regular customer of the plaintiffs, and only in that case upon the understanding that he would receive back the said deposit in the same kind of funds; and that the plaintiffs would not, by their officers, have received payment of the notes in suit, in case their amounts had been tendered at the time of maturity, in the paper of Virginia banks, (all of which were in a state of suspension of specie

payments,) and that the market value of Virginia bank notes, in the months of February, March, April, and May, 1840, in the city of Washington, (where the plaintiffs did business,) was from ½ to 1 per cent. less than the notes of the banks in said District, or the notes of banks in Baltimore, Maryland.

"And the defendant further gave evidence to show, that on the 30th January, 1840, he sent to the plaintiffs his written application for a loan, in these words, (see statement.) That he afterwards executed the note of the 6th February, 1840, named in the first bill of exceptions, and the note of the 25th February, 1840, now in suit; and then was passed to his credit, on the 22d February, 1840, on the books of the plaintiffs, the sum of $9,843.33, as the proceeds of the discount of said above-named note of the 6th February, 1840; and on the 28th February, 1840, the further sum of $5,939 was passed to his credit on the books of the plaintiffs, as the proceeds of the discount of the note dated 25th February, 1840. That the defendant checked out of the plaintiffs' bank the said several amounts so credited to him, and he gave evidence to show that some of his checks for said amounts were specially made payable in Virginia notes, and were in that form paid by the plaintiffs. That a check for upwards of $900, drawn by the defendant on plaintiffs on the 29th February, 1840, for part of the proceeds of the note of 25th Feb ruary, 1840, passed to his credit as aforesaid, was also made payable in Virginia money on its face, but the plaintiffs, through their officers, refused to pay even Virginia money on said check, but against the wishes and request of the bearer, one Sinclair, (to whom the said check was given, for value by
*68] said defendant,) paid the said check in notes of *suspended banks in Delaware, Pennsylvania, and Ohio, being notes more depreciated in value than Virginia paper in said District of Columbia; and that said Sinclair had to pay, on $260 of said money paid to him on said check, a discount of $10, to obtain the equivalent of Virginia notes, and the balance of said proceeds of said check the said Sinclair could not pass at all, and he required the defendant to take it from him, which he did. And further gave evidence tending to prove, that at the time of the dates of said note, and of the proceeds thereof being credited to defendant as aforesaid, it was the practice of the plaintiffs, through their officers, not to pay out the accommodations or discounts made by the plaintiffs, to such large amounts as either of said notes, in the local bank paper of said District or in specie, but in paper more depreciated than that of the said banks in said District. And further gave evidence tending to show, that in February,

March, April, and May, 1840, notes of the Virginia banks were not considered bankable money, and that the plaintiffs had a notice posted up in their bank, that they would not receive the paper of the Virginia banks on deposit or payment of debts; and that the defendant did receive the proceeds of the loans stated as aforesaid in Virginia paper, and some in Pennsylvania paper.

"And the plaintiffs, in cross-examining the said witness in said cause, further proved, that said Walker always drew out personally, and on his checks, either the Virginia money or the other money, as he desired or directed, and generally such as he asked for, and never at any time made any objection to the moneys he was paid in; and further, that he declared that Virginia money was as good to him as any funds in which he could be paid, and that he preferred it to any other. And further proved, that the state of the bank, and its business, and the notes they usually paid out, at the date of said defendant's letter, and at the date of the notes and the times of their being discounted, were well known to the customers of the bank; and that the defendant was then, and had been before, a considerable customer; and that all the notes of Virginia banks, or of other banks, paid out to defendant or other dealers, were received by the bank in the way of its business, at par; and notwithstanding the notice aforesaid, the bank took such notes in small payments, or when mixed with others in large payments, or on deposit by customers whose business was such as induced the officers to expect that they would take the same sort of notes in payment from the bank.

"And the plaintiffs further proved, on the cross-examination of said witness, the cashier of said bank, that, at the time of the dates and discounting the said notes, it was the custom of the bank to pay out, for the proceeds of its discounts, its own notes, or the notes of other banks, as desired by the parties receiving such discounts; that when the parties required it, they paid out their own notes, and when no particular paper was required, they paid out such as had most accumulated, and it was most convenient for the bank to pay out; and *that said Walker, if he had insisted on it, would, [*69 at the times of payment to him of said proceeds of said notes, according to their then practice, have had paid to him the same in their own notes.

"Whereupon the defendant prayed the court to instruct the jury, as follows, to wit:—

"Prayer No. 4:

"That if the jury believe, from the evidence aforesaid, that at the time the plaintiffs advanced the amounts of the notes in

question, after deducting the discounts on the same, it was well understood and arranged between the plaintiffs and defendant, that the said amount should be advanced and loaned by plaintiffs to defendant, on condition that defendant should draw such amounts from said bank in Virginia bank notes, or in notes of other state banks in a state of suspension of specie payments—all which notes were depreciated in the market, and commonly passed below the current value of the notes of the said bank, and notes of other suspended banks in this District, and all without exception, as well the notes of the said bank as of other suspended banks of this District, were considerably depreciated, and commonly passed below the current money of the United States; and that defendant did, in pursuance of the terms and conditions of said loan, in fact receive the amount of said loans from the plaintiffs in the bank notes of Virginia and of other states, which, at the time the same were so received by defendant, were depreciated considerably below the current value of the bank notes of this District, and still more considerably depreciated below the standard and current value of the current money of the United States, without any allowance for the depreciation of the same; and that such depreciation was well known to plaintiffs at the time and times of such loans; and that defendant would not have been permitted, and in fact was not permitted, by the plaintiffs or the officers of said bank, to draw out the amounts of such loans from the said bank, either in the notes of said bank, or of other solvent though suspended banks of this District, or in the current money of the United States; and that the plaintiffs were to have received, and expected to receive, in repayment of said advances and loans, current money of the United States, out of the said drafts on the navy agent, and would not have received, in repayment of said loans, the whole amount of either loan or note, the bank notes of Virginia or of other state banks in a state of suspension; and that such current money of the United States was then at a premium very considerably over and in exchange for the notes of any of the suspended state banks, and of any of the banks in this District: then the jury should conclude from said facts, that the said loans were usurious, and the said notes void.

"Prayer No. 5:

"If the jury believe, from the evidence aforesaid, that there was an application by the defendant to the plaintiffs for a loan
*70] of a large sum of money, and that the defendant being in want of such sum *of money, the plaintiffs agreed with him to loan him the amounts of the notes in suit, pro

vided he would take the said amounts (after deducting therefrom the rate of six per centum on the same for the time the said notes had to run) in notes of Virginia banks in a state of suspension, or some other state banks in a state of suspension, at their nominal amount; which said suspended bank notes were then depreciated in value below the value of the District bank notes, and much more depreciated below the value of specie; and that defendant would previously execute his notes to the plaintiffs for the nominal amounts so to be advanced to him, superadding thereto the interest on the amount mentioned in each of said notes for the time said note had to run; and that the defendant, in pursuance of said agreement, did afterwards receive the said notes of suspended banks in Virginia and other suspended state banks: And that if the jury further find that the bank reserved, on the respective nominal amounts of money so loaned to the defendant, interest thereon at the rate of six per centum per annum, paying him the balance of said loans in the depreciated paper aforesaid, and that the plaintiffs, according to the agreement between them and defendant, expected and intended to receive the amount of the notes in suit, with interest thereon, in specie, or in funds of greater value than the money so paid, as the proceeds of said notes as aforesaid: then the said facts, if believed by the jury, constitute an usurious agreement, and all contracts founded thereon are null and void.

"Prayer No. 6:

"If, from the evidence aforesaid, the jury shall find an agreement between the plaintiffs and the defendant, by which the defendant borrowed from the said plaintiffs the amounts of money mentioned in said notes, deducting interest on said amounts at the rate of six per centum per year, and that the proceeds of said loans were paid to the defendant by the plaintiffs in depreciated bank notes, as a device, and with intent to evade the statute of usury, and that the said notes were founded on such agreement, and made in pursuance thereof: then the jury ought to find the said agreement to be usurious.

"Prayer No. 7:

"If the jury believe, from the evidence aforesaid, that the notes in suit were given in consideration of a loan or loans of money made by plaintiffs to defendant, and that by the terms of the agreement on which said loan or loans were made, the defendant was compelled to take the same in depreciated paper, (well known to the plaintiffs to be depreciated,) whereby the defendant not only paid the legal interest on the nominal amount of said loans, but sustained a loss on the depreciated paper with which the plaintiffs paid him, then it is

competent for the jury to infer usury from the whole circumstances in evidence.

"Prayer No. 8:

*71] "It is competent for the jury, from all the circumstances in evidence, *to infer usury in the agreement or agreements on which the notes in suit were founded.

"But the court refused each of said prayers, though presented *seriatim*, and the defendant excepts to such refusal, and claims the same benefit of exception as if each refusal aforesaid was separately excepted to. And this his bill of exceptions is signed, sealed, and ordered to be enrolled, this 24th day of December, 1841."

Brent, for the plaintiff in error.
Hellen, for the defendants in error.

Mr. Justice WAYNE delivered the opinion of the court.

This suit is brought upon a promissory note, given in renewal of a former note, which had been discounted by the defendants in error. The defendants in the court below deny that the plaintiffs have any right of action upon the note sued on, on the ground that the first note was tainted with usury.

Such is the law in such a case. The mere change of securities for the same usurious loan to the same party who received the usury, or to a person having notice of the usury, does not purge the original illegal consideration, so as to give a right of action on the new security. Every subsequent security given for a loan originally usurious, however remote or often renewed, is void. *Tuthill* v. *Davis*, 20 Johns. (N. Y.), 285; *Reed* v. *Smith*, 9 Cow. (N. Y.), 647, and the cases of *Sauerwein* v. *Brunner*, 1 Harr. & G. (Md.), 477; *Thomas* v. *Catheral*, 5 Gill & J. (Md.), 23, decided in the courts of appeal in Maryland, under the statute of which state, it is said, the note now sued upon is void. But such is not the case before us. The defendant, Walker, had entered into a contract with the United States to supply the navy with beef, and to enable himself to do it, he applied to the bank, by letter dated the 30th January, for a loan of $25,000, and offered as a security a draft upon E. Kane, the navy agent, and also to assign to the bank the beef which he might put up. The bank accepted his offer, but before Walker gave the draft upon Mr. Kane, or made the assignment, he drew his note on the 6th day of February, seven days after he had written his letter asking for a loan, for $10,000, at ninety days, and handed it into bank; which note, at maturity, was renewed by the note of the 9th May, now in suit. This note, however, was not discounted

until the 18th February, and when then done, the proceeds were not passed to his credit until the 22d. The cause of the delay, in both particulars, the proof in the case shows, was, that Walker did not, until the 19th of February, draw his draft upon the navy agent, as he had proposed to do, or make an assignment of the beef to the bank, until the 20th. He may or may not have passed the navy agent's acceptance to the bank on the day it is dated, or have delivered his deed for the beef the day after; but between those days and the 22d inclusive, he did so, and the bank's security being then in its possession as he had offered it, the proceeds *of [*72 his $10,000 note was, on the last mentioned day, passed to his credit. But, in the mean time, Walker had drawn out of the bank, upon his checks, more than seven thousand dollars, with which he was debited when the proceeds of his note were carried to his credit; which sum and the interest upon it, computed for ninety-four days, from the date of the note, left a balance to his credit of $997.86. The computation of the interest from the 6th February, instead of from the day when the proceeds were carried to his credit, is the usury complained of. The letter of the defendant of the 30th January, asking for the loan of $25,000; the acceptances of his drafts upon the navy agent by that officer, and the defendant's assignment to the bank of certain portions of the beef which he had on hand, and which he might put up under his contract with the United States, and which assignment was not executed until the 20th February, were in evidence before the court below. The assignment recites the defendant's contract with the United States, so far as it was necessary to introduce the contract which he was about to make in it with the bank; then his indebtment to the bank for loans and discounts, his intention to secure the payment of the money due by him, and all drafts, note or notes that have been given for the same, or might be afterwards given by way of substitution or renewal of such drafts or notes, or any of them, &c., &c., and then states that the money which had already been advanced or loaned, or which might afterwards be advanced or loaned by the bank to the defendant, being for the purpose of enabling him to fulfil his contract with the United States. Now, the proof is positive, on both sides, that the note sued on was given in renewal of the note of the 6th February, which had first been given under his proposal for a loan, and that it was intended to be the note, the payment of which was to be secured by the assignment. Such being the evidence, the court correctly refused every instruction which was asked to refer the question of usury to the jury as a fact. It was a

case of a written contract, in which the court had the exclusive power of deciding whether it was usurious or not. *Levy* v. *Gadsby*, 3 Cranch, 180. But if it were not so, we think the instructions, as they were asked, could not have been given by the court to the jury. Each of them called upon the court to give an opinion upon the sufficiency of the evidence, and in all of them, except the eighth, there was a separation of the facts from the entire evidence, so as to bring them under the cases of *Scott* v. *Lloyd*, 9 Pet., 418; *Greenleaf* v. *Booth*, 9 Id., 292; and that of the *Chesapeake and Ohio Canal Co.* v. *Knapp*, 9 Id., 541. Nor do we think that there was any error in the instruction given by the court to the jury under the defendant's first prayer. The court sufficiently distinguish between the facts of the cashier's evidence and his belief, and tell the jury that they are to determine by the facts whether the cashier's inferences were justified.

The judgment of the court is affirmed.

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*73] *WILLIAM HENDERSON, PLAINTIFF IN ERROR, *v.* JOHN ANDERSON.

This court adheres to the rule laid down in *Walton* v. *Shelly*, 1 T. R., 296, sustained as it has been by the decisions of this court in *The Bank of the United States* v. *Dunn*, 6 Pet., 57; *The Bank of the Metropolis* v. *Jones*, 8 Id., 12, and *Scott* v. *Lloyd*, viz., that a party to a negotiable paper, having given it value and currency by the sanction of his name, shall not afterwards invalidate it by showing, upon his own testimony, that the consideration on which it was executed was illegal.[1]

THIS case was brought up by writ of error from the Circuit Court of the United States in and for the eastern district of Louisiana.

Anderson was a citizen of Kentucky, and William Henderson of Louisiana. Henderson was a partner in the commercial house of John Henderson and Co., carrying on business in the town of Warrenton, Warren county, Mississippi.

On the 3d of February, 1837, Thomas J. Green drew the following inland bill:

"*Warrenton, February 3d*, 1837.

"Exchange for $3,795.

"Twelve months after date of this my first of exchange,

[1] ADHERED TO. *Smyth* v. *Strader*, 4 How., 404 and note; *Sweeny* v. *Easter*, 1 Wall., 178.

(second of the same tenor and date unpaid,) pay to the order of Messrs. John Henderson & Co. thirty-seven hundred and ninety-five dollars, value received, and charge the same to account of Your obedient servant,

"THOS. J. GREEN.

"To Messrs. Briggs, Lacoste, & Co., Natchez."

It was endorsed by John Henderson & Co. and D. G. Barlow & Co., and passed into the hands of Anderson. Being protested for non-acceptance and non-payment, Anderson instituted suit against William Henderson, the partner, by way of petition, according to the practice in Louisiana, as follows:

"That the petitioner is holder and owner of a certain bill of exchange, for the sum of thirty-seven hundred and ninety-five dollars, drawn by Thomas J. Green, endorsed and directed to Messrs. Briggs, Lacoste & Co., Natchez, which said bill was drawn to the order, and was endorsed by John Henderson & Co., dated at Warrenton, in the state of Mississippi, on the 3d February, 1837, payable twelve months after date, which said bill of exchange, on the 8th of February, 1837, was protested for non-acceptance, and on the 6th day of February, 1838, the day of maturity, was duly protested for non-payment by James B. Cook, a notary public, in the city of Natchez, duly commissioned and qualified, and that said John Henderson & Co. was, by said notary, duly notified of said protest for non-acceptance, and for non-payment by, all of which will appear by reference of said bill of exchange and protest thereof, and said bill of exchange annexed is made a part thereof.

"At the time said bill was endorsed, petitioner avers that said William Henderson was a member of the late commercial firm of *John Henderson & Co., formerly doing [*74 business at Warrenton, under the said style and firm of John Henderson & Co., and as a member of the said firm, he is now liable *in solido* to pay to petitioner the amount of said bill of exchange, with interest, cost, and damages, and by the laws of the state of Mississippi petitioner is entitled to five per cent. damages on the amount of said bill.

"Petitioner alleges further, that the said William Henderson, though amicably requested, has neglected to pay the amount or any part thereof, for which he is indebted as aforesaid."

This petition was answered as follows:

"Now comes the defendant in the above entitled cause, and, by way of exception, says: that he is not bound to answer thereto, because he has not received, nor been served with, a true and exact copy of the petition, which by law he is entitled

to, and that he has not been legally cited to appear and answer herein. Wherefore he prays judgment, to be dismissed hence with his costs, &c.

"And if the foregoing exception be overruled, he pleads the general denial. He denies that he is in any manner liable to pay the bill of exchange sued on. He avers, specially, that he neither signed and endorsed said bill himself, nor in any way authorized the name of said firm of John Henderson & Co. to be signed and endorsed on the same; that it was so signed and endorsed as aforesaid by one John Henderson, without the knowledge and consent of defendant, and without any authority whatever; that such endorsement was made neither for the benefit, nor for any debt or liability, of the defendant or of said firm, nor was it made within the scope of the partnership powers, or on account of said firm; but without any due authority, and without the knowledge and consent of the defendant, the said bill was signed and endorsed as aforesaid by said John Henderson, purely for the benefit and accommodation of the drawer, the said Thomas J. Green: of all which the parties to said bill, and the holders thereof, before and after maturity, had due notice. Defendant requires strict proof of every allegation in the petition.

"Wherefore he prays judgment, with his costs, &c."

After sundry proceedings, a commission was issued to take the testimony of John Henderson, the acting partner and endorser of the bill, and the cause came on for trial in February, 1842. At the trial, the court excluded the evidence thus taken, and there was a judgment for the plaintiff; but the following bill of exceptions being taken to the ruling of the court, the decision came up for review.

"Be it remembered, that on the trial of the above entitled cause, the defendant's counsel, in order to prove the allegations set forth by the defendant in his answer, offered in evidence the deposition of one John Henderson, who, at the time *75] of the drawing and endorsement of the bill of exchange sued on, was a copartner with *defendant, the firm doing business under the name and style of John Henderson & Co.; and especially in order to prove that said John Henderson endorsed upon said bill the partnership name, without any authority whatever, without the knowledge or consent of defendant, and contrary to their articles of copartnership, and the course of dealing of said firm; that it was so endorsed in the presence of the plaintiff, purely for the accommodation of the drawer, Thomas J. Green, in discharge of a promissory note held by the plaintiff against said Green; that said bill was not endorsed as aforesaid, for the accommo-

dation, or on account of the said firm of John Henderson & Co., nor in any manner for the benefit of said firm of John Henderson & Co., nor in any matter in which said firm was interested; and that the plaintiff, when said bill was so drawn, and endorsed, and delivered to him, was fully cognisant of all the above facts. The plaintiff's counsel objected to the reception of said deposition, on the ground that the said John Henderson was incompetent to testify to any fact tending to invalidate the said bill, policy for the protection of commerce and the public morals requiring the rejection of such evidence. The court, after taking time to consider, sustained the objection, and rejected the deposition, on the ground taken, as aforesaid, by the plaintiff's counsel

"To this decision of the court, the defendant takes this his bill of exceptions, and prays that the same be allowed and signed by the court."

Conrad, for the plaintiff in error.

This is an action by the holder of a bill of exchange against one of the members of a commercial firm by which it purports to have been endorsed.

The endorsement is admitted, but the defence is, that it was made by one member of the firm, without the knowledge or consent of his copartner, the defendant, solely for the accommodation of the drawer, and in a matter in which the partnership had no interest or concern whatever.

To prove these facts, the partner who made the endorsement of the firm on the bill was examined under a commission, and his deposition, to be found at page 17 of the record, does fully establish them.

This deposition, however, was objected to on the ground that, being a party to the bill, he could not impeach it by his testimony. The objection was sustained by the court, and the deposition excluded. To this decision a bill of exceptions was taken, page 13 of the record, and the only question presented is as to the correctness of this decision.

As Henderson had no interest in the event of the suit, his general competency is not denied; but it is said, on the authority of the doctrine first distinctly laid down in *Walton* v. *Shelly*, that his testimony *is inadmissible so far as it goes to establish that the endorsement made by him was not binding on his copartners. [*76

Apart from the sanction which the doctrine, that a witness will not be permitted to impeach his own acts, derives from judicial decisions, it is difficult to perceive on what rational grounds it can rest. In either a moral or a legal point of view

it seems to be equally untenable. In a moral aspect, to confess a fault, is in some degree to atone for it; and what is under all circumstances a merit, becomes an imperative duty, when the concealment of a fault by the one who had committed it would involve an innocent person in its consequences.

In a legal point of view, the doctrine appears equally unsound. The civil law maxim *nemo allegans turpitudinem suam est audiendus*, invoked by Lord Mansfield in its support, is manifestly misapplied. Its proper application is to parties to the suit, not to witnesses. Its meaning is, that no man shall allege his own turpitude as the foundation of a claim or a right. It is equivalent to another axiom in that system, *ex turpi causâ non nascitur actio*, and is analogous to the common law principle that "no one shall take advantage of his own wrong."

In fact, in all other cases courts of justice have adopted the opposite principle. The general rule is, not only that a man may confess his own turpitude, but that he is bound to do so, whenever his confession will not subject him to a criminal prosecution; and even this exception, being established solely for the protection of the witness, may be waived by him. In criminal trials witnesses are every day allowed to prove crimes in the commission of which they aided and abetted. In chancery, (which has borrowed the practice from the civil law,) even parties may be compelled to disclose acts of fraud and moral turpitude.

It was no doubt a conviction on the part of the English courts that the rule was erroneous in principle and inconvenient in practice, that induced them first to limit its application to negotiable instruments, and finally to abandon it altogether. *Jordaine* v. *Lashbrook*, 7 T. R., 601.

In this country, in some of the states, the rule has never been followed. In others, where it had been originally adopted, the courts have been gradually receding from it. *Stafford* v. *Rice*, 5 Cow. (N. Y.), 23; *Powell* v. *Waters*, 8 Id., 673; *Williams* v. *Walbridge*, 3 Wend. (N. Y.), 415.

The rule is now universally held to apply only to negotiable paper.

This limitation of the rules is a virtual abandonment of the ground on which it was originally founded, inasmuch as the impropriety or indecency of allowing a man to contradict his own acts, can in no manner depend on the form or character of the instrument thus sought to be impeached.

The rule thus restricted must rest, therefore, on another
*77] principle, to wit, the public policy of protecting negotiable paper. Now on *this point, I will observe, first, that if the holder received the paper in good faith, he is suffi-

ciently secured by the principle which protects such paper in the hands of a *bona fide* holder against all equities that may exist between the original parties. If, on the contrary, he took the paper *mala fide*, there can be no good reason why he should be protected. In the first hypothesis, the evidence would be irrelevant; in the second, the reason for its exclusion does not exist.

There are, it is true, two exceptions to this remark, to wit: where the defence set up is that the note or bill originated in a gaming or usurious consideration. In these cases the instrument, even in the hands of a *bona fide* holder, is tainted with the illegality of its origin. But is not this exception founded on considerations of public policy? If so, how can a rule which excludes the evidence of the facts be also founded on public policy? How can it be at the same time politic to allow the consideration of negotiable paper to be inquired into in these cases, and at the same time impolitic to prevent the introduction of the only evidence by which, in the great majority of cases, the facts can be established?

At all events, if the object of the rule be to protect negotiable paper in the hands of *bona fide* holders for a valuable consideration, (and we apprehend it can hardly be desirable to protect any other,) then the rule itself should be co-extensive with the object sought to be attained. As the only cases, therefore, where the consideration can in such cases be inquired into are those in which usury or gaming is set up as a defence, it would be sufficient for all the public policy of the rule to say, that a party to a negotiable instrument should not be permitted to prove that it originated in a gambling or usurious consideration.

I have ventured on these general remarks in relation to the origin of this rule, because the rule itself is of recent origin, and the jurisprudence in regard to it, both in England and in this country, is so fluctuating, that I do not consider it as firmly established.

But we contend that the rule, even when carried as far as it has ever been by this court, does not apply to the present case.

1. In the first place, for it to be applicable, the paper sought to be attacked must not only be negotiable, but have been actually negotiated. *U. S.* v. *Dunn*, 5 Pet., 51; *Same* v. *Liffler*, 11 Pet., 91; *Blagg* v. *Phœnix Ins. Co.*, 3 Wash. C. C. R., 7; *Baird* v. *Cochrane*, 4. Serg. & R. (Pa.), 397.

Now the draft in the present case is still in the hands of a party to the original transaction. In point of form, it is true that the present holder is the assignee of the payee and

endorser, but in point of fact he was a party to the transaction in which it originated, and had full knowledge of the purposes for which it was executed. It was only a mode whereby the endorsers undertook to become sureties for a debt due by the drawers to the plaintiff. *Powell* v. *Waters*, 8 Cow. (N. Y.), 692.

*78] *2. Even supposing that the draft can be considered in a technical sense as having been negotiated, the endorsee certainly took it *mala fide*, and with a full knowledge that Henderson, in endorsing on it the signature of his firm, was committing a fraud on his copartners. Now, it is well settled that the rule does not apply to cases of fraud or misconduct to which the holder was a party. *Peterson* v. *Willing*, 3 Dall., 506; *Langer* v. *Felton*, 1 Rawle (Pa.), 141; *McPherson* v. *Powers*, 1 Serg. & R. (Pa.), 102.

3. The draft was drawn and payable in the state of Mississippi. Its nature and effect must, therefore, be tested by the laws of that state. Now, the law of that state provides, in substance, that in all cases where a promissory note or other obligation in writing has been assigned, the defendant shall be allowed the benefit of all want of lawful consideration, failure of considerations, payments, discounts, and set-offs made, had, or possessed against the same, previous to notice of the assignment, any law, usage, or custom in any wise to the contrary notwithstanding, in the same manner as if the same had been sued and prosecuted by the obligee or payee therein. Law of June 25, 1822, sect. 12. See Howard & Hutchinson's Dig. p. 372.

By this law negotiable instruments are placed precisely on the same footing with all other securities, and, therefore, the distinction on which alone the principle which prevents a party to an instrument from impeaching it by his testimony rests, is unknown in that state. The defence, in the present case, is want of consideration. Had the suit been brought by the assignee of an instrument not negotiable, the witness would unquestionably have been competent to prove this fact. But by the laws of Mississippi the assignee of a note or bill of exchange has no other or greater rights than the assignee of a bond or other instrument not negotiable in its character. The witness is, therefore, as competent in the one as in the other. The case is similar to that of *Baring* v. *Shippen*, 2 Binn. (Pa.), 165.

4. The *lex fori* must regulate the competency of witnesses, Story's Conflict of Laws, 526, sect. 635; and by the laws of Louisiana the witness was competent. Louisiana Code, art. 2260.

Mr. Justice DANIEL delivered the opinion of the court.

Upon a writ of error to the Circuit Court of the United States for the eastern district of Louisiana.

This was an action instituted at law in the Circuit Court for the eastern district in the state above mentioned, by petition, according to the modes of proceeding in the courts of that state, in the name of the defendant in error, as endorsee and holder of a bill of exchange for $3795, against the plaintiff in error, as an endorser of that bill.

The petition sets forth the facts following: That the petitioner is the holder and owner of the bill in question, which was drawn by one Thomas J. Green, at Warrenton, Mississippi, on the 3d of February, *1837, directed to [*79 Briggs, Lacoste & Co., at Natchez, payable, twelve months after date, to John Henderson & Co., by whom it was endorsed. That on the 8th day of February, 1837, this bill was protested for non-acceptance, and on the 6th day of February, 1838, was duly protested for non-payment in the city of Natchez, and that John Henderson & Co., were regularly notified of said protests for non-acceptance and non-payment. That at the time at which the said bill was so endorsed, the plaintiff in error was a member of the firm of John Henderson & Co., then doing business at Warrenton, in Mississippi, and as a member of that firm is liable to the petitioner for the amount of the bill of exchange, with interest, costs, and damages. That the petitioner is a citizen and resident of the state of Kentucky, and the said William Henderson, a citizen and inhabitant of the parish of Carroll, in the state of Louisiana. Upon the aforegoing petition the plaintiff below prayed judgment, with his costs, &c.

The defendant below, in the first place, took an exception to the petition on the ground that he had not been served with a true copy thereof, according to law, nor had been legally cited to appear, and therefore prayed to be dismissed; secondly, he interposed what is there styled "the general denial," corresponding with the general issue; and thirdly, he averred specially, that he neither signed nor endorsed the said bill himself, nor in any way authorized the name of the firm of John Henderson & Co., to be signed and endorsed on the same; that it was so signed and endorsed by one John Henderson without the knowledge and consent of the defendant, and without any authority whatsoever; and that such endorsement was made neither for the benefit, nor for any debt or liability of the defendant, nor of the said firm; nor was it made within the scope of the partnership powers, or on account of the firm; but that without any due authority, and without the

knowledge and consent of the defendant, the bill was signed and endorsed by said John Henderson purely for the benefit of the said Thomas J. Green, the drawer, of all which the parties to the said bill, and the holders thereof, before and after the maturity thereof, had notice.

At a subsequent day the exception first taken for the alleged want of regular service of the petition, was waived by the defendant, and the cause was continued; afterwards, upon the trial thereof, the defendant, in order to prove the allegations in his answer to the petition, offered in evidence the deposition of John Henderson, who, at the time of the drawing and endorsement of the bill of exchange sued on, was a copartner with the defendant in the firm, doing business under the name and style of John Henderson & Co.: this evidence being designed to show that John Henderson endorsed the partnership name upon the bill without authority, without the knowledge or consent of the defendant, and contrary to their articles
*80] of copartnership and to the course of their dealings; and that it was so *endorsed, in the presence of the plaintiff, purely for the accommodation of the drawer, Thomas J. Green, and not for the accommodation, nor on account of, nor in any manner for the benefit of the firm of John Henderson & Co. The reception of this deposition was objected to on the ground that John Henderson, as a member of the firm by whom and at the time the endorsement was made, was incompetent to testify to facts tending to invalidate the bill; the court sustained this objection, and rejected the deposition of John Henderson. To the ruling of the court on this point the defendant took an exception, which was reserved to him.

The exception thus taken presents the whole controversy in this case, which, controlled by principles heretofore ruled by this court, would seem to be limited within a very narrow compass. The inquiry how far a party to a negotiable instrument may be heard in a court of law to impeach or invalidate that instrument in the hands of another, is one which has led to considerable discussion and to different conclusions in the courts both of England and in this country. In the case of *Walton, assignee, &c.*, v. *Shelly*, 1 T. R., 296, the Court of King's Bench decided, that a party to a negotiable paper, having given it value and currency by the sanction of his name, shall not afterwards invalidate it by showing, upon his own testimony, that the consideration on which it was executed was illegal. Subsequently, by the same court, this rule was so far relaxed or abrogated as to permit the impeachment of such an instrument by persons standing in the same relation to it. See *Jordaine* v *Lashbrook*, 7 T. R., 601. Amongst

the different states of our union the decisions of the Court of King's Bench on either side of this question have been adopted. In this court the rule laid down in the case of *Walton* v. *Shelly* has been admitted and adhered to with a uniformity which establishes it as the law of the court. Thus, in the case of the *Bank of the United States* v. *Dunn*, 6 Pet., 51, it was enforced in an action by the holder of a note against an endorser, in which an attempt was made to impeach the note upon the testimony of a subsequent endorser; in the case of the *Bank of the Metropolis* v. *Jones*, 8 Pet., 12, in which the maker of a note was deemed an incompetent witness, in an action by the holder, to testify to facts in discharge of the liability of the endorser; and in the case of *Scott* v. *Lloyd*, the decision of this court, though not directly upon the same point, may be regarded as approving the rule established by the cases previously adjudicated. The judgment of the Circuit Court for the eastern district of Louisiana now under review being fully sustained by these authorities, that judgment is hereby affirmed.

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*EMILY POULTNEY ET AL., APPELLANTS, *v.* THE CITY OF LAFAYETTE, ISAAC T. PRESTON ET AL., DEFENDANTS. [*81

Before a case can be dismissed under the 21st rule, regulating equity practice, there must exist, in the technical sense, a plea or demurrer on the part of the defendant, which the plaintiff shall not have replied to or set down for hearing before the second term of the court after filing the same.
The complainant, if he chooses, may go to the hearing, on bill and answer.

THIS was an appeal from the Circuit Court of the United States for East Louisiana, sitting as a court of equity.

The heirs of Poultney filed a bill in chancery against the City of Lafayette and upwards of two hundred individuals.

It alleged that Poultney had purchased from the Widow Rousseau a tract of land about a mile and a half above the city of New Orleans in May, 1818; and that to secure the payment of part of the purchase money, he had mortgaged the same land to her for $80,000, payable in five annual instalments of $16,000 each; that Poultney died in October, 1819, leaving minor children, and that the defendants were in possession of the property, which the complainants claimed a right to redeem.

The proceedings which took place in court after this are

exceedingly complicated. Some of the defendants answered, using this expression, "the said answer to serve and be instead of a demurrer and pleas to the said bill of complaint." Objections were made to the jurisdiction of the court on account of the residence of the complainants, and a rule granted to try the fact of residence, which rule was afterwards set aside.

The bill was taken *pro confesso* as to many of the defendants, who were afterwards allowed to answer; numerous persons were vouched in warranty by the defendants, and afterwards the proceedings stricken out; demurrers were filed and overruled; the case was put upon the rule docket and then brought back again; three more defendants were brought in.

The answers, amongst other matters, averred that Poultney, at the time of his death, was insolvent, and that the property in question had been subjected to the operation of the laws in Louisiana and sold to its present possessors.

In 1842, the following proceedings took place.

On this first Monday of January, 1842, appeared Isaac T. Preston and C. M. Conrad, Esquires, for defendants, and filed in evidence with the clerk and master the following exhibits marked A, B, C, D, E, F, G, I, M, N, O, P; and, on further motion of said counsel, this cause is set for trial for hearing on the merits, for Friday, the 14th January, 1842.

And afterwards, to wit, on the 9th day of February, one thousand eight hundred and forty-two, the following entry was made of record, to wit:

*82] *" *Wednesday, February* 9, 1842.

"The court met, pursuant to adjournment. Present, the Honorable Theodore H. McCaleb, district judge; the Honorable John McKinley, presiding judge, absent.

Heirs of Poultney
v.
The city of Lafayette et als. } No. 37.

"On motion of Isaac T. Preston, Esq., this cause was called on the docket and fixed for trial for Wednesday, the 23d February, 1842."

And afterwards, to wit, on the 23d of February, 1842, the following order of court was entered of record, to wit:

" *Wednesday, February* 23, 1842.

"The court met, pursuant to adjournment. Present, the Honorable Theodore H. McCaleb, district judge; the Honorable John McKinley, presiding judge, absent.

Heirs of Poultney
v.
The city of Lafayette et. als. } No. 37.

"On the 23d day of February, 1842, this case was called for trial; whereupon the complainants, by their counsel, objected, upon the ground that the cause was improperly put on the issue docket, and set down for trial; that no replication had been filed, and that, since the last term of the court, some of the defendants had died, and their heirs or representatives had not been made parties to the suit; and moved the court to remand this cause to the rule docket, that an issue might be formed. On the other hand, the defendants insisted that the case should proceed immediately to trial, or be dismissed under the rules of practice presented by the Supreme Court in equity cases. These motions were all fully argued together, and, after argument thereof, the court took time to consider."

And afterwards, to wit, on the 24th day of February, one thousand eight hundred and forty-two, the following entry and decree were entered of record, to wit:

"*Thursday, February* 24, 1842.

"The court met, pursuant to adjournment. Present, Honorable Theodore H. McCaleb, district judge; Honorable John McKinley, presiding judge, absent.

Heirs of Poultney
v.
The city of Lafayette et als. } No. 37.

"On this day the court proceeded to deliver its opinion on the motions argued and submitted yesterday in this cause. When the court had announced it was about to deliver its opinion, the counsel for the complainants moved to be allowed to file the documents A and B, but the court refused to receive them, stating that it was *about to [*83
deliver an opinion on the cause; upon [which] the counsel for the complainants handed them to the clerk, the court considering that the complainants' application to file a bill of revivor or exceptions came too late.

Decree of the Court.

"The defendants having moved to dismiss the bill of complaint in this cause, under the 21st of the rules in equity cases, and it appearing to the court that the complainants had not set for trial the pleas filed in this case, nor filed replication to the answers, although more than two terms of the court had elapsed since the filing of the same, it is ordered and adjudged,

and decreed, that the bill of complaint in this case be dismissed as to all the defendants, and the complainants pay the costs of suit."

From which decree, the complainants appealed to this court.

The case was argued by Mr. *Chinn* (in writing) for the appellants, and Mr. *Coxe*, for the appellees.

The following is an extract from Mr. *Chinn's* argument:

The bill in this cause was dismissed under the 21st rule of this court, prescribed for the inferior courts in chancery causes, because "the plaintiffs had not set for trial the pleas filed, nor filed replications to the answers, although two terms of the court had elapsed since filing the same." To all this it is confidently responded, that there were no pleas filed in the cause. Some of the defendants, availing themselves of the 23d rule of practice, instead of filing a formal demurrer or plea, did insist on some special matter in the answers, which they left with the clerk of the court, and claimed to have the benefit thereof, as though they had pleaded the same matter. They commence "The several answer of," &c.—"The said answer also to serve and be instead of a demurrer and pleas to the said bill of complaint."—Was there then a plea in the cause? Surely not. There was something else; there was an answer to serve and be instead of a plea, and of which the party claimed the advantage, as under the answer and not under a plea: and so it was regarded by the court when an application was made to it to try the question of citizenship:—and although the party could avail himself of all the matter, by way of answer, the plaintiff could not otherwise regard it than as an answer, and could do no otherwise towards forming an issue, without leave of court, than file a general replication to it, as an answer.

It is said in the order dismissing the bill, that more than two terms had elapsed since filing the pleas. Now if the most rigid and technical interpretation of the rules are to be had, and they shall be conformed to to the letter, it becomes important to ascertain when the pleas of the defendant were filed. The answers of some of the defendants appear to have been lodged with the clerk of the court in his office, on the day of ; there was no *notice taken of them upon the *84] rule docket or in the minutes of the court, and consequently they were not parts of the record; the defendants were not bound by them, and the complainants were not notified of their being on file. On the 24th, 30th, and 31st of December, 1839, and on the 19th February, 1840, notes are made upon the rule docket of the filing of answers upon those days, but nothing is said about the filing of pleas. Neither of

those days were or could have been rule days; consequently the act was nugatory. On the 24th of December, 1839, a motion was sustained to set aside the decree *nisi*, and leave was given the defendants to file answers, which does not appear from the minutes then to have been done; and the complainants were, by order of the court, protected in their right thereafter to file any exception to the answers that might be filed. Let it be borne in mind, that the decree *nisi* was set aside without putting the parties defendant upon any terms whatever; they were not even compelled to pay costs.

In the answers various record and documents are properly referred to as exhibits, and constitute parts of the answers—the most material and only important parts, and without the filing of which the plaintiff could not safely proceed in making up an issue in the cause. At the January rules, 1842, these exhibits were for the first time filed and noted upon the rule docket—they never having been before even lodged with the clerk. Up to that time the filing of answers was not complete; then for the first time the cause stood upon bill and answer—and at the same time the cause was set for hearing by the defendants, on the merits, for Friday, the 14th January, 1842; at the same time they suggested the death of Layton, and the names of his heirs, and took an order at the rules that they be parties. There was then clearly a misconception by the court, that more than two terms had elapsed since the filing of the pleas and before the order dismissing the bill.

It doth clearly appear from the 17th rule, that issues are to be formed, and causes are to be prepared for trial, at the rules and upon the rule days, and that neither party is bound to notice the proceedings of his adversary except they be then entered in the rule book, or they be had in open court.

The court below predicated its order dismissing the bill somewhat upon the failure of the plaintiffs to file replications to the answers, and suffering two terms to expire.

Pending a motion made by the complainants to set aside the rule for hearing of the cause upon its merits, and to remand the cause to the rule docket, that an issue might be had, and during the argument of that motion, the defendants moved to dismiss the bill under the 21st rule, without any previous rule therefor, without any previous notice thereof, and in direct conflict with their rule for a trial of the cause upon its merits, which they had taken. The court, in pronouncing the order, says: "The defendants having moved to *dismiss under the 21st rule, and it appearing to the court that the complainants had not set for trial the pleas filed, nor filed [*85

replications to the answers, although two terms of the court had elapsed since the filing the same, it is ordered and adjudged, and decreed, that the suit be dismissed "as to all of the defendants." In response, therefore, to an application to remand the cause to the rules, and in response to an application to dismiss under the 21st rule, he does dismiss under that rule; and because the plaintiff had not replied to the answers.

The plaintiffs were not bound to notice or reply to the answers until two calendar months after they were put in, filed at the rules, or in open court; and upon their failure to reply or file exceptions, they might be ruled to reply; and upon the expiration of that rule, and no replication or exceptions filed, the suit might be dismissed: but even then, in the discretion of the court, the cause might be retained upon the payment of cost.—*Rule 13th.* But in this case there had been no rule for replication. No pains of dismissal could be inflicted upon the plaintiff for failing to reply, until he was ruled to do so. It was then a vain invocation of the 13th rule to sanction a dismissal moved for under the 21st.

After filing a replication it would be too late to except to an answer; but the courts, in the exercise of a sound discretion, and for the attainment of justice, would suffer the replication to be withdrawn and exceptions had. But, at any time before replication, it is the right of the plaintiff, at the rules or in open court, to file exceptions to the defendants' answers; and this right was particularly secured to the plaintiffs, without limitation as to time, upon setting aside the decree *nisi*. The court will not ordinarily set aside a decree *nisi*, until the coming in of a sufficient answer. In this case the rule was *ex gratia* departed from; reserving the right of the plaintiffs to reply to the answers when they should come in.

Upon the trial of the plaintiffs' motion, and before the decision thereof—when there had been no rule for replication, and the party's right to file exceptions to the defendants' answers would appear to have been unquestionable—they offered to do so, but the court refused them permission; and, inasmuch as Robert Layton had subsequently to the preceding term departed this life, and his heirs were not properly before the court, the plaintiffs offered to file a bill of revivor against them, which the court refused to permit: and without accepting any terms, or putting the plaintiff upon any terms to speed the cause, put an end to the cause by pronouncing a final decree—and did not, even in that, reserve to the plaintiffs the right to commence *de novo*.

It is supposed that the decretal order dismissing the plaintiffs' bill is erroneous for its ambiguity, and want of reason-

able judicial certainty. After dismissing the bill as *to all the defendants*—which applies to all who had been served with process, or who had been *made defendants in the bill, and who had not answered—the decree proceeds: "and [*86 the complainants pay the costs of suit with regard to such of the defendants as had filed pleas of demurrers—the complainant having failed to reply to or set for hearing such pleas or demurrers before the second term of the court after filing the same, agreeably to the 21st of the rules of practice for the courts of equity of the United States, as prescribed by the Supreme Court of the United States."

Proctor filed the only demurrer that was filed in the cause. An issue was had speedily. It was set for hearing, and inasmuch as Layton and others relied upon the same matters, they were all heard. The demurrers were overruled, and the defendants ordered to answer over, which Proctor has never done, notwithstanding which he has succeeded in turning the plaintiff out of court. Now can this court ascertain from the decree, which of the persons named as defendants in the complainants' bill are entitled to their costs? &c., &c.

We therefore conclude that the inferior court erred,—

1. In deciding that the defendants, or any of them, had filed pleas in the cause.

2. That the failure of the plaintiffs to set such pleas down for trial should be visited with the pains of dismissal of their bill.

3. That the plaintiffs were in default in not replying to the defendants' answers.

4. In refusing leave to the plaintiffs to file exceptions to the answers, and a bill of revivor against the heirs of a deceased party.

5. In dismissing the plaintiffs' bill as to all or any of the parties.

6. In awarding costs to the defendants, or any of them, and not defining to whom.

7. In refusing to award a rehearing of the case upon the petition and affidavit filed.

Coxe, for appellees, said that after the case was argued in the court below, and when the court was about to deliver its opinion, some papers were presented, but the court very properly said it was too late. The printed argument refers to the position of the case when the judge decided it; and there was nothing in this position to prevent the complainants from filing a replication. The record shows that they endeavored to excuse themselves for this omission by filing a petition for

a re-hearing; and it is, in fact, from the refusal of the court to grant this that the appeal was taken.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal from the decree of the Circuit Court for the eastern district of Louisiana.

To determine the point brought up by the appeal, it is unnecessary to state the substance of the bill or answers. On motion, the Circuit Court dismissed the bill, under the *87] 21st rule, because the *"complainants had not set down for hearing the pleas filed in this case, nor filed replication to the answers, although more than two terms of the court had elapsed since filing of the same."

The rule referred to is, "if the plaintiff shall not reply to, or set for hearing any plea or demurrer before the second term of the court after filing the same, the bill may be dismissed, with costs." No plea had been filed in the case, and the demurrer filed had been overruled, so that the rule did not apply to the case as it stood at the time of the dismissal. The rule can only apply to demurrers and pleas technically so called. And there is no other rule of proceeding which authorized the decree of the court. The complainant may, if he choose, go to the hearing on the bill and answer.

The decree of the Circuit Court is reversed, and the cause is remanded for further proceedings.

AMOS KENDALL, PLAINTIFF IN ERROR, *v.* WILLIAM B. STOKES, LUCIUS W. STOCKTON, AND DANIEL MOORE, SURVIVORS OF RICHARD C. STOCKTON, DEFENDANTS IN ERROR.

[The reader is referred to a former case between these parties, reported in 12 Peters, 524. The decision of the court in the present case is so intimately connected with the facts in both, that it is impossible to give a clear account of the principles established, without a reference to those facts.]

After the decision in the former case, Stokes, &c., brought a suit against Kendall, which rested ultimately on two counts, viz., the first and fifth. The first claimed damages for the suspension, by Kendall, on the books of the Post-office Department, of certain credits which had been entered by his predecessor. The fifth, for the refusal, by Kendall, to credit Stokes, &c., with the amount awarded in their favor by the solicitor of the treasury.

The damages claimed in the first count constituted a part of the reference to the solicitor, as shown by the plaintiffs below in their own evidence.

After a reference, an award, and the reception of the money awarded, another suit cannot be maintained on the original cause of action, upon the ground that the party had not proved, before the referee, all the damages he had

sustained, or that his damage exceeded the amount which the arbitrator awarded.[1]

The acts complained of were not ministerial, but were official acts, done by Kendall in his character of postmaster-general. A public officer, acting from a sense of duty, in a matter where he is required to exercise discretion, is not liable to an action for an error of judgment.[2]

[1] Mr. Russell says: "After an award has been made, no action can be maintained for any matter in difference within the scope of the submission, which was not in fact brought before the arbitrator, nor can advantage be taken of it in answer to a motion for attachment. Parties, therefore, must be careful to bring forward at the time of the reference every claim within the submission on which they intend to insist." Russell on Award, 478 (4 ed.) In support of this statement he cites the leading English case, *Dunn* v. *Murray*, 9 Barn. & C., 780; also *Dicas* v. *Jay*, 6 Bing., 519; *Smith* v. *Johnson*, 15 East, 213; *Collins* v. *Powell*, 2 T. R., 756; *Clegg* v. *Dearden*, 12 Q. B., 576.

An award directing mutual releases closes all accounts between the parties up to the time of the submission, and precludes a second arbitrator, on a subsequent reference of all matters in difference, from awarding in respect of a claim, which existed at the time of the former submission, and might have been decided by the former arbitrator, although in fact it was not considered or awarded on by him. *Turningham* v. *Turningham*, 4 Nev. & M., 786; see also *Robson* v. *Railston*, 1 Barn. & Ad., 723; but see *Rovee* v. *Farmer*, 4 T. R., 146; *Golightly* v. *Jellicoe*, 4 T. R., 147, note.

An award of compensation for lands taken by a railroad is a bar to a claim afterwards made for mesne profits. *Smalley* v. *Blackburn R. W. Co.*, 2 Hurlst. & N., 158; s. c., 27 L. J., Ex. 65.

But it is said in equity any matter intentionally omitted by the parties, or rejected by the arbitrator, will be considered. *Jones* v. *Bennett*, 1 Bro., P. C., 528; *Brophy* v. *Holmes*, 2 Moll., 1; see also *Spencer* v. *Spencer*, 2 Younge & J., 249; *Upton* v. *Upton*, 1 Dowl., 400; *Steers* v. *Lashley*, 1 Esp., 166; *Oxenham* v. *Lemon*, 2 Dow. & Ry., 461.

The courts of New York are inclined to adopt the English rule; "neither party is at liberty to withhold a demand from the cognizance of the arbitrators, and then to sue for it." *Wheeler* v. *Van Houten*, 12 Johns. (N. Y.), 311; see *Fidler* v. *Cooper*, 19 Wend. (N. Y.), 285; *Ott* v. *Schroeppel*, 5 N. Y., 182; *Coleman* v. *Wade*, 6 Id., 44; *Harris* v. *Wilson*, 1 Wend. (N. Y.), 511.

But in Connecticut it is held that an award operates only in respect of those matters which are, in fact, mentioned by, or by the necessary implication of its language, are included within the instrument itself. *Bunnell* v. *Pinto*, 4 Conn., 431; so in Vermont, *Robinson* v. *Morse*, 26 Vt., 392; *Buck* v. *Buck*, 2 Id., 417; *Briggs* v. *Brewster*, 23 Id., 100; so in Maine, *Inhabitants of North Yarmouth* v. *Inhabitants of Cumberland*, 6 Greenl. (Me.), 21; *Bixby* v. *Whitney*, 5 Id., 192; probably so in New Hampshire, *Whittemore* v. *Whittemore*, 2 N. H., 26; so in Massachusetts, *Webster* v. *Lee*, 5 Mass., 334; *King* v. *Savory*, 8 Cush. (Mass.), 312; *Edwards* v. *Stevens*, 1 Allen (Mass.), 315; *Hodges* v. *Hodges*, 9 Mass., 320. But when a party is requested to present a claim embraced in the submission, and he refuses to do so, in all the courts it will be held that the claim is forever barred. *Warfield* v. *Holbrook*, 20 Pick. (Mass.), 531.

[2] CITED. *United States* v. *Schurz*, 12 Otto, 395; s. c., 1 Morr. Tr., 306. See *Brewer* v. *Watson*, 65 Ala., 96.

The rule seems to be well settled in this country and in England that an officer is not liable to an action if he falls into an error, in a case where the act done is not merely ministerial, but one in relation to which his duty is to exercise his judgment and discretion, even though an individual may suffer by his mistake. *Gould* v. *Hammond*, McAll., 235; *Wilkes* v. *Dinsman*, 7 How., 89, 132; *Otis* v. *Walter*, 2 Wheat., 18; *Wells* v. *Atlanta*, 43 Ga., 67; *Wilson* v. *New York*, 1 Den. (N. Y.), 595; *Freeport* v. *Marks*, 59 Pa. St., 253; *Buell* v. *Ball*, 20 Iowa, 282; *Butler* v. *Kent*, 19 Johns. (N. Y.), 223; *Fuller* v. *Gould*, 20 Vt., 643; *Londegan* v. *Hammer*, 18 Iowa, 508;

With regard to the fifth count, the application for the mandamus covered the same ground as that taken in this count. Both rested on the refusal of Kendall to pay a sum of money to which Stokes, &c., were lawfully entitled.

But where a party has a choice of remedies for a wrong done, selects one, proceeds to judgment, and reaps the fruits of his judgment, he cannot afterwards proceed in another suit for the same cause of action.

This is especially true where the party has resorted to a mandamus, because it is not issued where the law affords a party any other adequate mode of redress. To allow him to maintain another suit for the same cause of action *would be inconsistent with the decision of the court which awarded the mandamus.[3]

*88]

Evidence of special damage was improperly admitted, under the circumstances of the case in the court below.[4]

THIS case was brought up, by writ of error, from the Circuit Court of the United States, for the district of Columbia, sitting for the county of Washington.

The Supreme Court of the United States having affirmed (12 Pet., 524) the decision of the Circuit Court, awarding a mandamus against Amos Kendall, application was made by Stokes, &c., to Kendall, that the sum of money mentioned in the proceedings should be carried to their credit on the books of the department. Kendall declined to interfere in the matter, upon the ground that the "auditor" had charge of the books, and that he himself had no power to settle claims, and no money

Bailey v. *Wiggins*, 5 Harr. (Del.), 462; *Reid* v. *Hood*, 2 Nott. & M. (S. C.), 471; *Deal* v. *Harris*, 8 Md., 40; *Walker* v. *Halleck*, 32 Ind., 239; *Hamilton* v. *Williams*, 26 Ala., 527; *Lenox* v. *Grant*, 8 Mo., 254; *Jordan* v. *Hanson*, 49 N. H., 199; *Kelly* v. *Bemis*, 4 Gray (Mass.), 83; *Ambler* v. *Church*, 1 Root (Conn.), 211; *Dawkin* v. *Lord Roheby*, 4 Fost., 806; *Dawkins* v. *Lord Paulet*, L. R., 5 Q. B., 94; s. c., 9 Best & S., 768.

But if he is actuated by malice, cruelty or wilful oppression, the action does lie. *Otis* v. *Watkins*, 9 Cranch, 339, 355; *Baker* v. *State*, 27 Ind., 485; *Morris* v. *People*, 3 Den. (N. Y.), 381; *Hoggatt* v. *Bigley*, 6 Humph. (Tenn.), 236; *Chickering v. Robinson*, 3 Cush. (Mass.), 543; *Gregory* v. *Brooks*, 37 Conn., 365; *Wall* v. *Trumball*, 16 Mich., 228; *Seaman* v. *Patten*, 2 Cal. (N. Y.), 312; *Thompson* v. *Sands*, 8 Wend. (N. Y.), 462; *Reed* v. *Conway*, 20 Mo., 22; *Lilienthal* v. *Campbell*, 22 La. Ann., 600. And proof may be introduced to show that fact. *Martin* v. *Mott*, 12 Wheat., 31; *United States* v. *Gillis*, 2 Cranch C. C., 44; *Gould* v. *Hammond*, McAll., 235.

Judges trying cases, are in no way liable personally, even though they act maliciously or corruptly. *Bradley* v. *Fisher*, 13 Wall., 348; *Fray* v. *Blackburn*, 3 Best & S., 576; *Floyd* v. *Baker*, 12 Co., 25; *Dicas* v. *Lord Brougham*, 6 Car. & P., 249; *Gates* v. *Lansing*, 5 Johns. (N. Y.), 282; s. c., 9 Johns., 394; *Lining* v. *Bentham*, 2 Bay (S. C.), 1; *Mostyn* v. *Fabrigas*, Cowp., 161.

Stewart v. *Cooley*, 23 Minn., 347; s. c., 23 Am. Rep., 690, is an exception to the general rule; but that case is only an illustration of the rule that a bad case makes bad law.

The doctrine of *Kendall* v. *Stokes* was applied to a judge of an election. *United States* v. *Gillis*, 2 Cranch C. C., 44. Nor is a clerk of a court liable for an honest error of judgment of a competent deputy, where he himself is in no default. *Patons* v. *Lee*, 2 Cranch C. C., 646. As to courts-martial, see *Dyner* v. *Hoover*, 20 How., 65.

[3] See *Taylor* v. *County Court*, 2 Utah T., 409.

[4] See *Insurance Co.* v. *Piaggio*, 16 Wall., 386.

to pay them with. On the 30th of March, 1838, a peremptory mandamus was issued by the Circuit Court, commanding him to obey and execute the act of Congress immediately on the receipt of the writ, and certify perfect obedience to it on the 3d of April next.

On the 3d of April, Mr. Kendall addressed a letter to the court, saying that he had communicated the award of the solicitor of the Treasury to the auditor, and received from him official information that the balance of said award had been entered to the credit of the claimants, on the books.

In October, 1839, Stokes, &c., brought a suit against Kendall. The declaration consisted of five counts, three of which were abandoned after a verdict and motion in arrest of judgment. The two remaining were the first and fifth.

The first count averred, in substance, that the plaintiffs, with Richard C. Stockton, deceased, under and in the name of said Richard, were contractors for the transportation of the mails of the United States, by virtue of certain contracts entered into between them and the late William T. Barry, then postmaster-general of the United States. That the said William T. Barry, as postmaster-general, did cause certain credits to be given, allowed, and entered in the books, accounts, and proper papers in the Post-office Department, in favor of the plaintiffs and said Richard, as such mail contractors, under and in the name of said Richard. That the defendant, on succeeding Mr. Barry in the office of postmaster-general, wrongfully, illegally, maliciously, and oppressively caused said items of account, so entered, and credited, and allowed, and upon which payments had been made, to be suspended on the books, accounts, and papers of the Post-office Department; and did cause said plaintiffs and said Richard, under and in the name of said Richard, to be charged on said books, papers, and accounts, with said several items and sums of money, amounting to $122,000.

The 5th count averred the passage of a private act of Congress *entitled "An act for the relief of Wm. B. Stokes, Richard C. Stockton, Lucius W. Stockton, and Daniel Moore," by which the solicitor of the Treasury was authorized and required to determine on the equity of the claims of them, or any of them, growing out of certain alleged contracts between them and Mr. Barry, and by which the postmaster-general was directed to credit them with such amounts as might be awarded, pursuant to the act. This count also averred the actual rendition of an award by Virgil Maxcy, then solicitor of the Treasury, for the sum of $162,727.05, in favor of Richard C. Stockton, as the representative of himself and [*89

the plaintiffs below, and the refusal of Mr. Kendall to comply fully with the terms of the award, by crediting them with the full amount awarded.

The cause came on for trial at November term, 1841, which resulted in a verdict for the plaintiffs.

After the rendition of the verdict aforesaid, the defendant produced the following certificate by the said jurors, and prayed the court to be permitted to have the same entered on the minutes of the court, to which the court assented.

"We, the jurors, empannelled in the case of *William B. Stokes and others* v. *Amos Kendall*, and in which case we have this day rendered our verdict for the plaintiffs for $11,000, do hereby certify that said verdict was not founded on any idea that the defendant performed the acts complained of by the plaintiffs, and for which we gave damages as above stated, with any intent other than a desire faithfully to perform the duties of his office of postmaster-general, and protect the public interests committed to his charge; but the said damages were given by us on the ground that the acts complained of were illegal, and that the said sum of $11,000 was the amount of actual damage to plaintiffs estimated by us to have resulted from said illegal acts."

Upon the trial the defendant took three bills of exceptions.

The 1st exception was to the competency of the evidence to sustain the action. The evidence offered by the plaintiffs was:

1. A transcript of the record in the mandamus case.
2. The report of Virgil Maxcy, solicitor of the Treasury.
3. Sundry letters and documents.
4. Oral testimony relating to the partnership.

The defendant offered four prayers to the court, praying instructions to the jury that the defendant was not responsible to the plaintiffs in the right in which they then sued under the 1st count; that he was not liable under the 5th count for refusing to comply with so much of the award of the solicitor as he, on the ground of want of jurisdiction in the said solicitor, refused to comply with; that he was not liable for consequential damages; and that the plaintiffs had no joint right of action.

All of which prayers were refused by the court, to which refusal the defendant excepted.

*90] *2d Bill of Exceptions.

The defendant then offered in evidence sundry depositions and papers.

1. The depositions of Andrew Jackson, Martin Van Buren, and B. T. Butler.

2. Correspondence between Mr. Kendall and the attorney-general.

3. The attorney-general's opinion, Document No. 123, 26th Congress, 2d session, House of Rep. Ex. Doc. page 1010.

4. Letter from the solicitor of the Treasury.

5. Reports of post-office committees of Senate and House.

6. The evidence of Francis S. Key, Esq.

Upon all which evidence the defendant founded four prayers:

1. That plaintiffs were not contractors.

2. That defendant was not liable if he acted from a conviction that it was his official duty to set aside the extra allowances.

3. That he was not liable if he acted from a conviction that the solicitor had no lawful jurisdiction to audit and adjust the items, &c.

4. That he was not liable for any of his acts, if the jury believe that he acted with the *bona fide* intention to perform duly the duties of his office, and without malice or intention to injure and oppress the plaintiffs.

All of which prayers the court refused to grant, and to the refusal the defendant excepted.

3d Bill of Exceptions.

The plaintiffs offered evidence to prove their special expenses and losses, such as counsel-fees, tavern-bills, discounts, &c., to the admission of which evidence the defendant objected; but the court overruled the objection and allowed it to be given. To which overruling the defendant excepted.

The case came up upon all these grounds.

Dent and *Jones*, for the plaintiff in error.

Coxe, for defendants.

Dent laid down the following propositions:

1. That the official acts complained of in the declaration amount to nothing more than a breach of contract, and a refusal to pay money due by contract and award.

2. That these acts, with what motives, aggravations, or consequences soever accompanied, lay no ground for an action, sounding in damages, as for an official or personal tort or misdemeanor.

3. But as the case is now presented by the record, it is a *concessum*, that the defendant's motives for the acts complained of were clear of all malice, self-interest, and intention to vex, harass, injure, or oppress the plaintiffs, and proceeded from no other intent than a desire faithfully to perform the duties of

his office, and to protect the public interest committed to his
*91] charge; and that if the acts complained of were in truth illegal, or in any way a transgression of his *public duties, (which is altogether denied,) they resulted from an honest mistake and misapprehension of the authority and duties of his office; consequently, the broad question is now presented, whether an honest misapprehension of the rights of the plaintiffs below, and a contestation of those rights, under the influence of honest mistake, and in the manner and form appearing by the declaration and evidence in the cause, be an official or personal tort or misdemeanor. We maintain the negative of this question.

4. If the plaintiffs have shown, either in pleading or in evidence, any cause of action, still we except to all the evidence of special damage pretended to have been sustained by the plaintiffs, in consequence of the defendant's refusal to allow and pay them the several sums of money pretended to be due under their contract—such as discounts and usury paid by them for money borrowed, expenses of travel, large fees to counsel, tavern-bills, and other expenses incurred in pursuit of their claim against the Post-office Department. We maintain that the only measure of damages for withholding money due, (whether on public or private account,) is the legal interest on the sum due.

5. That all right of action (if any such ever existed, which is denied) for the pretended misfeasance complained of in the first count, was completely extinguished and barred by the act of Congress authorizing the solicitor of the Treasury to settle and adjust the claims of the plaintiffs and R. C. Stockton, or any of them, for the extra services, &c., in the act mentioned, and by the full and final settlement and adjustment of the same by the solicitor, as shown by the plaintiffs.

6. That all right of action (if any such ever existed, which is denied) for the pretended nonfeasance complained of in the 5th count, (to wit, the non-payment of a certain portion of the solicitor's award,) was extinguished and barred by the plaintiffs' election of their remedy by mandamus, and the result of the procedure on such mandamus, as shown by the plaintiffs.

7. That the defendant, as postmaster-general, had authority and was *prima facie* justified, by the circumstances of the case, for both the acts of pretended misfeasance and nonfeasance complained of: 1st, for originally contesting their claims for the pretended extra services afterwards referred to the solicitor of the Treasury; and 2dly, for maintaining that the solicitor of the treasury had exceeded the scope of the authority committed to him by the act of Congress, in allowing certain

claims not within the terms of the submission to his award, as defined in the act of Congress; and, consequently, for refusing to pay so much of the solicitor's award as allowed such inadmissible claims.

8. That there is a fatal misjoinder of parties in this action; inasmuch as the plaintiffs, by their own showing, both in pleading and in evidence, have no such joint rights of contract or action as they have sued on in this case.

*9. That from their own exhibit of the original contracts, under which all the plaintiffs' claims arise, taken [*92 in connection with the acts of Congress relating to the premises, the plaintiffs' own case, upon their own showing, absolutely concludes against any such joint rights of contract and action as are asserted in the first count.

10. That from their own exhibit of the awards of the solicitor of the Treasury, referred to in their 5th count, their case, upon their own showing, equally concludes against such joint rights of action as are asserted in the 5th count.

Consequently, the evidence of O. B. Brown ought to have been rejected, as incompetent and inadmissible; and the court ought to have allowed the several instructions asked by the defendant in regard to such joint rights.

11. We maintain generally, and without exception, that the points of evidence, and of law, raised by the defendant in the course of the trial, and in arrest of judgment, (as set forth in the several bills of exceptions and motions in arrest of judgment, already referred to,) ought to have been sustained by the Circuit Court, and were erroneously overruled by that court.

Dent went largely into the history of the case, referring to many of the public documents which have been mentioned. He then took up the points, and contended that the act of 1825, (3 Story, 1985,) made the postmaster-general a disbursing officer of all the revenue of the department. See also 3 Story, 1630, the 4th section of the act of March 3d, 1817; 2 Story, 1091, 5th section of the act of April 21st, 1808; *Gidley* v. *Palmerston*, 7 J. B. Moo., 91, 108; 3 Brod. & B., 275; 7 Com. Law Rep., 434.

On the third point he cited 1 East, 555, 558, and 564, note; 11 Johns. (N. Y.), 114.

The fourth point he thought too clear to be discussed.

On the fifth and sixth points he contended that the plaintiffs were precluded from this action, by having already elected their remedy. 2 W. Bl., edition of 1828, 779, 827; 4 Rawle (Pa.), 287–299; 17 Pick. (Mass.), 7–14; 6 Wheat., 109;

1 Salk., 11; 2 Bos. & P., 71; 7 Johns. (N. Y.), 21; 8 Id., 384.

The evidence which the plaintiff introduced in this case is the same which they brought before the solicitor to obtain his award, and also in the mandamus case; and this may be shown under a plea of the general issue as well as under a plea in bar. *Young* v. *Black*, 7 Cranch, 565.

Coxe, for defendants in error, referred to numerous documents to show that there was no misjoinder of parties; that they had all been recognized as joint contractors. He denied that it was a *concessum* that there was no malice; on the contrary, it is averred in the declaration. He denied also that the merits of this case had ever been settled. They were not *93] by the solicitor of the Treasury, whose *province it was to decide on the legality or illegality of Mr. Kendall's conduct in suspending the payments. They were not settled in the mandamus case, which related to an entry which Mr. Kendall refused to make. The Circuit Court directed him to make it, and the Supreme Court affirmed the decision. 12 Pet., 609.

Having disposed of some preliminary objections, Mr. *Coxe* proceeded to discuss the liability of public officers to pay money withheld, and cited 6 T. R., 443; 3 Wils., 443; 2 Kane, 312; 6 Munf. (Va.), 271; 11 Mass., 350; 3 Wheat., 346; 2 Cranch, 175; 1 T. R., 493; 7 Mass., 282; 2 W. Bl., 1141; 5 Johns. (N. Y.), 282; 9 Id., 395; 13 Id., 141; 1 Cranch, 137; 10 Pet., *Swartwout's case.*

The defendants' conduct was illegal. See 15 Pet., case of *Bank of Metropolis;* 9 Cl. & F., 251, 278, 283; Lyndhurst's opinion, 284; Ld. Brougham's opinion, 287–303, as to malice; 310, Ld. Campbell's opinion.

Jones, in reply and conclusion, referred to several parts of the record to show that there was not such a partnership as would enable the plaintiffs to sue, and to other parts to show that malice in Mr. Kendall was wholly out of the case. This destroyed all claim for consequential damages.

He then discussed what constitutes an illegal act in a public officer, so as to make him liable in damages for withholding money, and referred to Story on Agency, 308, sect. 305; 1 Cranch, 345.

Upon what grounds actions *ex delicto* have been maintained against a public officer, he referred to 1 East, 562, 568; and to show what description and quality of officers are liable to

this action, he referred to the case of *Gidley* v. *Ld. Palmerston*, 111.

If the action be really founded upon a form of contract, yet, being mixed up with tort, every defence, good against the form *ex contractu*, is good against the tort. 1 Esp., 172; 8 T. R., 335.

An action will lie against a public officer only when the duty to be performed is wholly ministerial, and never in a case where judgment is to be exercised. *United States* v. *Bank of Metropolis*, 15 Pet., 403.

As to the mandamus case, Mr. Kendall did not disobey, for the extra allowance extended only to the end of the first quarter of 1835.

Mr. Chief Justice TANEY delivered the opinion of the court.

The record in this case is very voluminous, and contains a great mass of testimony, and also many incidental questions of law not involving the merits of the case, which were raised and decided in the Circuit Court, and to which exceptions were taken by the plaintiff in error. But both parties have expressed their desire that the controversy should now be terminated by the judgment of this court; and that the leading principles which must ultimately decide the rights of the parties should now be settled; and that the case should [*94 *not be disposed of upon any technical or other objections which would leave it open to further litigation. In this view of the subject it is unnecessary to give a detailed statement of the proceedings in the court below. Such a statement would render this opinion needlessly tedious and complicated. We shall be better understood by a brief summary of the pleadings and evidence, together with the particular points upon which our decision turns; leaving unnoticed those parts of the record which can have no influence on the judgment we are about to give, nor vary in any degree the ultimate rights of the parties.

At the time of the trial and verdict in the Circuit Court the declaration contained five counts. But after the verdict was rendered, the plaintiffs in that court, with the leave of the court, entered a *nolle prosequi* upon the second, third, and fourth, and the judgment was entered on the first and the fifth. It is only of these two last mentioned counts, therefore, that it is necessary to speak. The verdict was a general one for the plaintiffs, and their damages assessed at $11,000.

The first count states that by virtue of certain contracts made with William T. Barry, while he was postmaster-general,

and services performed under them, the plaintiffs on the 1st of May, 1835, were entitled to receive and have allowed to them the sum of $122,000, and that that sum was accordingly credited to them on the books of the Post-office Department; and that Amos Kendall, the defendant in the court below, afterwards became postmaster-general, and as such illegally and maliciously caused the items composing the said amount to be suspended on the books of the department, and the plaintiffs to be charged therewith: whereby they were greatly injured, and put to great expenses, and suffered in their business and credit.

The fifth count recites the act of Congress of July 2d, 1836, by which the solicitor of the Treasury was authorized to settle and adjust the claims of the plaintiffs for services rendered by them under contracts with William T. Barry, while he was postmaster-general, and which had been suspended by Amos Kendall, then postmaster-general, and to make them such allowances therefore as upon a full examination of all the evidence might seem right and according to principles of equity; and the postmaster-general directed to credit them with whatever sum or sums of money the solicitor should decide to be due to them, for or on account of such service or contract; and after this recital of the act of Congress, the plaintiffs proceed to aver that services had been performed by them under contracts with William T. Barry, while he was postmaster-general, on which their pay had been suspended by Amos Kendall, then postmaster-general, and that for these claims the solicitor of the Treasury allowed the plaintiffs large sums of money amounting to $162,727.05; that the defendant had notice of the premises, and that it became
*95] his *duty as postmaster-general to credit the plaintiffs with this sum; but that he illegally and maliciously refused to give the credit, by reason whereof the plaintiffs were subjected to great loss, their credit impaired, and they were obliged to incur heavy expenses in prosecuting their rights, to their damage in the sum of $100,000.

The defendant plead not guilty, upon which issue was joined.

At the trial, the plaintiffs offered in evidence the record of the proceedings in the mandamus which issued from the Circuit Court upon their relation on the 7th day of June, 1837, commanding the said Amos Kendall to enter the credit for the sum awarded by the solicitor. It is needless to state at large the proceedings in that suit, as they are sufficiently set forth in the report of the case in 12 Pet., 524; the judgment of the Circuit Court awarding a peremptory mandamus having been

brought by writ of error before the Supreme Court, and there affirmed at January term, 1838. Various papers and letters were also offered in evidence by the plaintiffs to show that the allowances mentioned in the declaration had been suspended by the defendant; and that after the award of the solicitor, and before the original mandamus issued, he had refused to credit $39,472.47, part of the sum awarded, upon the ground that the items composing it were not a part of the subject-matter referred; and upon which, as the defendant insisted, the solicitor had no right to award. Other papers and letters were also offered showing that after the judgment of the Circuit Court awarding a peremptory mandamus had been affirmed in the Supreme Court, the plaintiffs demanded a credit for the above-mentioned balance on the 23d of March, 1838: that the defendant declined entering the credit, alleging that a recent change in the post-office law had placed the books and accounts of the department in the custody of the auditor; and some difficulty having arisen on this point, the Circuit Court, on the 30th of March, 1838, issued a mandamus commanding the postmaster-general to enter the credit on the books of the department; and to this writ the defendant made return on the 3d of April, 1838, that the said credit had been entered by the auditor who had the legal custody of the books.

The whole of this evidence was objected to by the defendant, but the objection was overruled and the testimony given to the jury. And upon the evidence so offered by the plaintiffs, before any evidence was produced on his part, the defendant moved for the following instruction from the court:

"The defendant, upon each and every of the plaintiffs' said counts, severally and successively prayed the opinion of the court, and their instruction to the jury that the evidence so as aforesaid produced and given on the part of the plaintiffs, so far as the same is competent to sustain such count, is not competent and sufficient to be left to the jury as evidence of any act or acts done or omitted or refused to be done by the defendant, which legally laid him liable *to the plaintiffs in this action, under such count, for the consequential damages claimed by the plaintiffs in such count." This instruction was refused and the defendant excepted. [*96

The question presented to the court by this motion in substance was this: Had the plaintiffs upon the evidence adduced by them shown themselves entitled in point of law to maintain their action for the causes stated in their declaration upon the breaches therein assigned, assuming that the jury believed the testimony to be true?

The instruction asked for was in the nature of a demurrer

to the evidence, and in modern practice has, in some of the states, taken the place of it. In the Maryland courts, from which the Circuit Court borrowed its practice, a prayer of this description at the time of the cession of the District and for a long time before, was a familiar proceeding, and a demurrer to evidence seldom, if ever, resorted to. And the refusal of the court was equivalent to an instruction that the plaintiffs had shown such a cause of action as would authorize the jury, if they believed the evidence, to find a verdict in favor of the plaintiffs, and to assess damages against the defendant for the causes of action stated in the declaration.

Now the cause of action stated in the first count is the suspension, by the defendant, of the allowances made by his predecessor in office; and of the recharge of sums with which the plaintiffs had been credited by Mr. Barry when he was the postmaster-general. And it appeared in evidence, by the proceedings in the mandamus, that the plaintiffs being unable to settle with the defendant the dispute between them on the subject, they applied to Congress for relief; that upon this application a law was passed referring the matter to the solicitor of the treasury, with directions that he should inquire into, and determine the equity of these claims, and make them such allowances therefor as might seem right according to the principles of equity; and that the postmaster-general should credit them with whatever sums of money, if any, the solicitor should decide to be due; that the plaintiffs assented to this reference, and offered evidence before the solicitor that they were entitled to the allowances and credits claimed by them; and that, from the conduct of the postmaster-general, in suspending and recharging these allowances and credits, they had been compelled to pay a large amount in discounts and interest, in order to carry on their business; and that the solicitor had finally determined in favor of their claims, and awarded to them the sum hereinbefore mentioned, giving them, as appears in his report to Congress, interest on the money withheld from them; and also, that, before this suit was brought, they had obtained a credit on the books of the department for the whole sum awarded by the solicitor.

Assuming, for the sake of the argument, that an action might in the first instance have been sustained against the
*97] postmaster-general, can the plaintiffs still support a suit upon the original cause of *action? It was not a controversy between the plaintiffs and Amos Kendall as a private individual, but between them and a public officer acting for and on behalf of the United States. If they had sustained damage, it was the consequence of his act, and the question of

damages was necessarily referred with the subject-matter in controversy, out of which that question arose. It was an incident to the principal matters referred, and therefore within the scope of the reference; and it is not material to inquire whether damages for the detention of the money were claimed or not, or allowed or not. In point of fact, however, the plaintiffs did claim interest on the money withheld as a damage sustained from the conduct of the postmaster-general, and offered proof before the solicitor of the amount of discounts and interest they had been compelled to pay; and, moreover, were allowed, in the award, a large sum on that account, which was paid to them as well as the principal sum. The question, then, on the first count is, can a party, after a reference, an award, and the receipt of the money awarded, maintain a suit on the original cause of action upon the ground that he had not proved, before the referee, all the damages he had sustained? or that his damage exceeded the amount which the arbitrator awarded? We think not. The rule on that subject is well settled. It has been decided in many cases, and is clearly stated in *Dunn* v. *Murray*, 9 Barn. & C., 780. The plaintiffs, upon their own showing, therefore, were not entitled to maintain their action on the first count, and the Circuit Court ought so to have directed the jury.

The judgment upon this count is also liable to another objection equally fatal. The acts complained of were not what the law terms ministerial, but were official acts done by the defendant in his character of postmaster-general. The declaration, it is true, charges that they were maliciously done, but that was not the ground upon which the Circuit Court sustained the action either on this count or the fifth. For, among other instructions moved for on behalf of the defendant, the court were requested to direct the jury:

"That, if they found from the evidence that the postmaster-general acted from the conviction that he had lawful power and authority as postmaster-general to set aside the extra allowances made by his predecessor, and to suspend and recharge the same, and from a conviction that it was his official duty to do so; and if the plaintiffs suffered no injury from such official act, but the inconveniences necessarily resulting therefrom, that the defendant was not liable."

This instruction was refused; the court thereby in effect giving the jury to understand that however correct and praiseworthy the motives of the officer might be, he was still liable to the action, and chargeable with damages.

We are not aware of any case in England or in this country in which it has been held that a public *officer, [*98

acting to the best of his judgment and from a sense of duty, in a matter of account with an individual, has been held liable to an action for an error of judgment. The postmaster-general had undoubtedly the right to examine into this account, in order to ascertain whether there were any errors in it which he was authorized to correct, and whether the allowances had in fact been made by Mr. Barry; and he had a right to suspend these items until he made his examination and formed his judgment. It repeatedly and unavoidably happens, in transactions with the government, that money due to an individual is withheld from him for a time, and payment suspended in order to afford an opportunity for a more thorough examination. Sometimes erroneous constructions of the law may lead to the final rejection of a claim in cases where it ought to be allowed. But a public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion; even although an individual may suffer by his mistake.[1] A contrary principle would indeed be pregnant with the greatest mischiefs. It is unnecessary, we think, to refer to the many cases by which this doctrine has been established. It was fully recognized in the case of *Gidley, Exec. of Holland* v. *Ld. Palmerston*, 7 J. B. Moo., 91, 3 Brod. & B., 275.

The case in 9 Cl. & F., 251, recently decided in England, in the House of Lords, has been much relied on in the argument for the defendant in error. But upon an examination of that case it will be found that it had been decided by the Court of Sessions in Scotland, in a former suit between the same parties, that the act complained of was a mere ministerial act which the party was bound to perform; and that this judgment had been affirmed in the house of Lords. And the action against the party, for refusing to do the act, was maintained, not upon the ground only that it was ministerial, but because it had been decided to be such by the highest judicial tribunal known to the laws of Great Britain. The refusal for which the suit was brought took place after this decision; and the learned Lords, by whom the case was decided, held that the act of refusal, under such circumstances, was to be regarded as wilful, and with knowledge; that the refusal to obey the lawful decree of a court of justice was a wrong for which the party, who had sustained injury by it, might maintain an action, and recover damages against the wrongdoer. This case, therefore,

[1] APPLIED. *Teal* v. *Felton*, 12 How., 291. CITED. *Garland* v. *Davis*, 4 How., 149.

is in no respect in conflict with the principles above stated, nor with the rule laid down in the case of *Gidley* v. *Ld. Palmerston.*

In the case before us the settlement of the accounts of the plaintiffs properly belonged to the Post-office Department, of which the defendant was the head. As the law then stood it was his duty to exercise his judgment upon them. He committed an error in supposing that he had a right to set aside allowances for services rendered upon which his predecessor in office had finally decided. But as the *case [*99 admits that he acted from a sense of public duty and without malice, his mistake in a matter properly belonging to the department over which he presided can give no cause of action against him.

We proceed to the fifth count. But before we examine the cause of action there stated, it will be proper to advert to the principles settled by this court in the case of the mandamus hereinbefore referred to. The court in that case, speaking of the nature and character of the proceeding by mandamus, which had been fully argued at the bar, said that it was an action or suit brought in a court of justice, asserting a right, and prosecuted according to the forms of judicial proceeding; and that a party was entitled to it when there was no other adequate remedy; and that although in the case then before them the plaintiffs in the court below might have brought their action against the defendant for damages on account of his refusal to give the credit directed by the act of Congress, yet as that remedy might not be adequate to afford redress, they were, as a matter of right, entitled to pursue the remedy by mandamus.

Now, the former case was between these same parties, and the wrong then complained of by the plaintiffs, as well as in the case before us on the fifth count, was the refusal of the defendant to enter a credit on the books of the Post-office Department for the amount awarded by the solicitor. In other words, it was for the refusal to pay them a sum of money to which they were lawfully entitled. The credit on the books was nothing more than the form in which the act of Congress, referring the dispute to the solicitor, directed the payment to be made. For the object and effect of that entry was to discharge the plaintiffs from so much money, if on other accounts they were debtors to that amount; and if no other debt was due from them to the United States, the credit entitled them to receive at once from the government the amount credited. The action of mandamus was brought to recover it, and the plaintiffs show by their evidence that they did recover it in

that suit. The gist of the action in that case was the breach of duty in not entering the credit, and it was assigned by the plaintiffs as their cause of action. The cause of action in the present case is the same; and the breach here assigned, as well as in the former case, is the refusal of the defendant to enter this credit. The evidence to prove the plaintiffs' cause of action is also identical in both actions. Indeed, the record of the proceedings in the mandamus is the testimony relied on to show the refusal of the postmaster-general, and the circumstances under which he refused, and the reasons he assigned for it. But where a party has a choice of remedies for a wrong done to him, and he elects one, and proceeds to judgment, and obtains the fruits of his judgment, can he, in any case, afterwards proceed in another suit for the same cause of action? It is true that in the suit by mandamus the plaintiffs could recover nothing beyond the amount awarded. But they *100] knew that, when they elected the remedy. If the goods of a *party are forcibly taken away under circumstances of violence and aggravation, he may bring trespass, and in that form of action recover not only the value of the property, but also what are called vindictive damages, that is, such damages as the jury may think proper to give to punish the wrongdoer. But if, instead of an action of trespass he elects to bring trover, where he can recover only the value of the property, it never has been supposed that, after having prosecuted the suit to judgment and received the damages awarded him, he can then bring trespass upon the ground that he could not in the action of trover give evidence of the circumstance of aggravation, which entitled him to demand vindictive damages.

The same principle is involved here. The plaintiffs show that they have sued for and recovered in the mandamus suit the full amount of the award; and having recovered the debt they now bring another suit upon the same cause of action, because in the former one they could not recover damages for the detention of the money. The law does not permit a party to be twice harassed for the same cause of action; nor suffer a plaintiff to proceed in one suit to recover the principal sum of money, and then support another to recover damages for the detention. This principle will be found to be fully recognised in 2 Bl. Rep., 830, 831; 5 Co., 61, *Sparry's case;* Com. Dig. tit. *Action*, K., 3. And in the case of *Moses* v. *Macfarlan*, 2 Burr., 1010, Ld. Mansfield held that the plaintiff having a right to bring an action of assumpsit for money had and received to his use or a special action on the case on an agreement, and having made his election by bringing assumpsit, a recovery in that action would bar one on the agreement,

although in the latter he could not only recover the money claimed in the action of assumpsit, but also the costs and expenses he had been put to. The case before us falls directly within the rule stated by Ld. Mansfield.[1]

This objection applies with still more force, when, as in this instance, the party has proceeded by mandamus. The remedy in that form, originally, was not regarded as an action by the party, but as a prerogative writ commanding the execution of an act, where otherwise justice would be obstructed; and issuing only in cases relating to the public and the government; and it was never issued when the party had any other remedy. It is now regarded as an action by the party on whose relation it is granted, but subject still to this restriction, that it cannot be granted to a party where the law affords him any other adequate means of redress.[2] Whenever, therefore, a mandamus is applied for, it is upon the ground that he cannot obtain redress in any other form of proceeding. And to allow him to bring another action for the very same cause after he has obtained the benefit of the mandamus, would not only be harassing the defendant with two suits for the same thing, but would be inconsistent with the grounds upon which he asked for the mandamus, and inconsistent also with the decision of the court which awarded it. If he had *another [*101 remedy, which was incomplete and inadequate, he abandoned

[1] That one cause of action cannot be split up and sued upon in several suits, is well established, and it is now only a familiar rule. *Markham* v. *Middleton*, 2 Str., 1259; *Miller* v. *Covert*, 1 Wend. (N. Y.), 487; *Stevens* v. *Lockwood*, 13 Id., 644; *Guernsey* v. *Carver*, 9 Id., 492; s. c. 24 Am. Dec., 60; *Philips* v. *Berick*, 16 Johns. (N. Y.), 136; s. c. 8 Am. Dec., 299; *Secor* v. *Sturges*, 16 N. Y., 548; *Badger* v. *Titcomb*, 15 Pick. (Mass.), 409; *Warren* v. *Comings*, 6 Cush. (Mass.), 103; *Crosby* v. *Jerolomon*, 37 Ind., 277; *Dutton* v. *Shaw*, 35 Mich., 431; *Turner* v. *Plowden*, 5 Gill. & J. (Md.), 52; s. c. 23 Am. Dec., 596; *Goodrich* v. *Gale*, 97 Mass., 15; *Dalton* v. *Bentley*, 15 Ill., 420; *China* v. *Hamilton*, Hempst., 438.

So a judgment in replevin is a bar to a subsequent action for damages for the same taking. *Bennett* v. *Hood*, 1 Allen (Mass.), 47; *Henites* v. *Porter*, 23 Cal., 385. If several chattels are taken at the same time, a recovery of one of them by suit, is a bar to the recovery of the others. *Union Railroad Co.* v. *Traube*, 59 Mo., 355; *Farrington* v. *Payne*, 15 Johns. (N. Y.), 432; *Bates* v. *Quattlebone*, 2 Nott. & M. (S. C.), 205; *Cracroft* v. *Cochron*, 16 Iowa, 301; *Veghte* v. *Hoagland*, 5 Dutch (N. J.), 125; *Buckland* v. *Johnson*, 15 Com. B., 145; even though the plaintiff is prevented from including them in the former suit, by the fraud of the defendant. *McCaffrey* v. *Carter*, 125 Mass., 330. In addition to the authorities cited, see *Trask* v. *Railroad*, 2 Allen (Mass.), 331; *Hodsall* v. *Stallebras*, 11 Ad. & E., 301; *Smith* v. *Great Western R. Co.*, 6 U. C. C. P., 156; *Watson* v. *Van Meter*, 43 Iowa, 76; *Fowle* v. *New Haven*, 107 Mass., 352; *Whitney* v. *Town of Clarendon*, 18 Vt., 252; *Smith* v. *Way*, 9 Allen (Mass.), 472; *Clegg* v. *Dearden*, 12 Q. B., 576; *Hitchin* v. *Campbell*, 2 W. Bl., 827; s. c. 3 Wils., 304.

[2] FOLLOWED. *Kentucky* v. *Dennison*, 24 How., 97; *Fisher* v. *City of Charleston*, 17 W. Va., 605. CITED, *Hartman* v. *Greenhow*, 12 Otto, 675.

it by applying for and obtaining the mandamus. It is treated both by him and the court as no remedy. Such was obviously the meaning of the Supreme Court in the opinion delivered in the former suit between these parties, where they speak of the action on the case, and give him the mandamus, because the other form of action was inadequate to redress the injury, and they would not therefore require the plaintiffs to pursue it. And they speak of the action on the case as an alternative remedy; not as accumulative and in addition to the mandamus. In the case in 9 Clark & F., 251, hereinbefore mentioned upon another point, the attorney-general in his argument said that no other action would lie in any case where the party was entitled to a mandamus. And Ld. Campbell, in giving his judgment, said that this proposition was not universally true; and at any rate applied only to the original grant of the mandamus, and not to the remedy for disobeying it; and that no case had been cited to show that an action would not lie for disobedience to the judgment of the court. This remark upon the proposition stated by the attorney-general shows clearly that in his judgment you could not resort to a mandamus and to an action on the case also for the same thing. If the postmaster-general had refused to obey the mandamus, then indeed an action on the case might have been maintained against him. But the present suit is not brought on that ground. No question is presented here as to the necessity of pleading a former recovery in bar, nor as to the right to offer it in evidence upon the general issue. The point in the Circuit Court did not arise upon the pleading of the defendant, nor upon evidence offered by him; but upon the case made by the plaintiffs, in which, by the same evidence that proved their original cause of action, they also proved that they had already sued the defendant upon it, and recovered a judgment, which had been satisfied before this suit was brought. And we think upon such evidence the instruction first above mentioned ought to have been given on this (the fifth) count, as it appeared by the plaintiffs' own showing that they had already recovered satisfaction for the injury complained of in their declaration.

The case before us is altogether unlike the cases referred to in the argument, where, after a party has been admitted or restored to an office, he has maintained an action of assumpsit or case to recover the emoluments which had been received by another, or of which he had been deprived during the time of his exclusion. In those cases the cause of action in the mandamus was the exclusion from office; and the suit afterwards brought was to recover the emoluments and profits to which

his admission or restoration to office showed him to have been legally entitled. The action of assumpsit or case would not have restored him to the office, nor have secured his right to the profits. But in the case before the court, if this action had been resorted to in the first instance, instead of the mandamus, the plaintiffs *could have recovered the [*102 amount due on the award, and the damages arising from its unlawful detention must have been assessed and recovered in the same verdict. Clearly, they could not have maintained one action on the case for the amount due, and then brought another to recover the damages; and this, not because both were actions on the case, but because they could not be permitted to harass the defendant with two suits for the same thing, no matter by what name the actions may be technically called, nor whether both are actions on the case, or one of them called a mandamus.

But if this action could have been maintained, we think that most of the evidence admitted by the Circuit Court to enhance the damages ought not to have been received. It consisted chiefly of discounts and interest paid by the plaintiffs before the award of the solicitor, and of expenses on journeys and tavern bills, and fees paid to counsel for prosecuting their claim before Congress and the courts. It appears by the record that before this evidence was offered the court had instructed the jury, that malice on the part of the defendant was not necessary to support the action; and it appears also that the jury, which found the verdict and assessed the damages, declared that their verdict was not founded on any idea that the defendant did the acts complained of, and for which they gave the damages of $11,000, with any intent other than a desire faithfully to perform the duties of his office of postmaster-general, and to protect the public interests committed to his charge, and that the damages were given on the ground that his acts were illegal, and that the sum given was the amount of the actual damage estimated to have resulted from his illegal acts.

We have already said that although this action is in form for a tort, yet in substance and in truth it is an action for the non-payment of money. And upon the principles upon which it was supported by the court, and decided by the jury, if there had been no proceeding by mandamus to bar the action, the legal measure of damages upon the fifth count would undoubtedly have been the amount due on the award, with interest upon it.

The testimony, however, appears to have been offered chiefly under the first count, because the items for interest

paid, and travelling and tavern expenses, for the most part, bear dates before the award, and also a portion of the fees of counsel. The evidence was certainly inadmissible under this count, since, for the reasons already given, no action could be maintained upon it, if there had been no previous proceeding by mandamus, and consequently no damages could be recovered upon it. But independently of this consideration, and even if the action could have been sustained, there are insuperable objections to the admission of this testimony. In the first place, no special damages are laid in the declaration; and in that form of pleading no damages are recoverable, but such as
*103] the law implies to have accrued from the wrong complained of; 1 Chit. Pl., 385: and *certainly the law does not imply damages of the description above stated. But we think the evidence was not admissible in any form of pleading. In the case of *Hathaway* v. *Barrow*, 1 Campb., 151, in an action on the case for a conspiracy to prevent the plaintiff from obtaining his certificate under a commission of bankruptcy, the court refused to receive evidence of extra costs incurred by the plaintiff in a petition before the chancellor. In the case of *Jenkins* v. *Biddulph*, 4 Bingh., 160, in an action against a sheriff for a false return, the court said they were clearly of opinion that the plaintiff was not entitled to recover the extra costs he had paid; that, as between the attorneys and their clients, the case might be different, because the attorney might have special instructions, which may warrant him in incurring the extra cost, but that in a case like the one before them the plaintiff could only claim such costs as the prothonotary had taxed. And in the case of *Grace* v. *Morgan*, 2 Bingh. N. C., 534, in an action for a vexatious and excessive distress, the plaintiff was not allowed to recover as damages the extra costs in an action of replevin which the plaintiff had brought for the goods distrained; and the case in 1 Stark., 306, in which a contrary principle had been adopted, was overruled.

These were stronger cases for extra costs than the one before us. The admission of the testimony in relation to the largest item in these charges, that is, for interest paid by the plaintiffs, amounting to more than $9000, is still more objectionable. For it appears from the statement in the exception that the very same account had been laid before the solicitor, and had induced him, as he states in his report to Congress, to make the plaintiffs an allowance in his award for interest, amounting to $6893.93. And to admit this evidence again in this suit was to enable the plaintiff to recover twice for the same thing; and after having received from the United States what

was deemed by the referee a just compensation for this item of damage, to recover it over again from the defendant.

There are several other questions stated in the record, but it is needless to remark upon them, as the opinions already expressed dispose of the whole case. The judgment of the Circuit Court must be reversed.

[For the dissenting opinion of Mr. Justice McLEAN, see App., p. 789.]

EX PARTE DORR.

Neither the Supreme Court, nor any other court of the United States, or judge thereof, can issue a *habeas corpus* to bring up a prisoner, who is in custody under a sentence or execution of a state court, for any other purpose than to be used as a witness.[1]

An application for a writ of error, prayed for without the authority of the party concerned, but at the request of his friends, cannot be granted.[2]

*Mr. TREADWELL moved for a writ of *habeas corpus* to bring up Thomas W. Dorr, of Rhode Island, under the following circumstances: [*104

He stated that Dorr was charged with levying war against the state of Rhode Island, and sentenced to the state's prison for life, in June, 1844; that upon the trial a point of law was raised, whether treason could be committed against a state, but the court would not permit counsel to argue it; that a

[1] RECOGNIZED. *In re Metzger*, 5 How., 191. CITED. *In re Kaine*, 14 How., 132; *Taylor* v. *Carroll*, 20 Id., 597. See *Conner* v. *Long*, 14 Otto, 234.

This is an exposition of the fourteenth section of the judiciary act. In *Bennett* v. *Bennett*, Deady, 299, a petition was granted to Susan Bennett, directed to Sanford Bennett to obtain the custody of her infant child, whose custody had been awarded her on granting her a divorce from her husband, Sanford. See also *United States* v. *Green*, 3 Mason, 482.

Any one convicted of a violation of the laws of the United States by a state court may have the writ. *Ex parte Bridges*, 2 Woods, 428.

If the person praying for the writ is in custody of a United States officer, no state court can release him. *United States* v. *Van Fossen*, 1 Dill., 406, 411.

The United States court cannot release one confined for contempt by a state court, even though the suit in which the contempt occurred, relates to property of Indians, over which such state court has no jurisdiction. *Ex parte Forbes*, 1 Dill., 363.

[2] Mere volunteers, who do not appear in behalf of the prisoner or show some right to represent him, will not be listened to. *Rex* v. *Clark*, 3 Burr., 1363. "A mere stranger has no right to come to the court and ask that a party who makes no affidavit, and who is not suggested to be so coerced or to be incapable of making one, may be brought up by *habeas corpus* to be discharged from restraint." *Ex parte Child*, 29 Eng. Law & Eq., 259.

One bringing up a person on *habeas corpus* without his request or authority, may be sued in an action on the case by the person thus brought up. *Linda* v. *Hudson*, 1 Cush. (Mass.), 385.

motion was made to suspend the sentence until a writ of error could be sued out to bring the case before the Supreme Court of the United States, but the court refused to suspend it. He then read affidavits to show that personal access to Dorr was denied, in consequence of which his authority could not be obtained for an application for such a writ. The present motion for a *habeas corpus* was based upon this fact. There was no other mode of ascertaining whether or not it was Dorr's wish that his case should be brought up to this court. Under the 14th section of the Judiciary Act, the power to issue writs of *habeas corpus* was vested in the judges of the United States' courts. 3 Story's Com. tit. Jurisdiction, 588, 590, 594, 595, 603, 608, 610, 625.

The case was in itself proper to be brought up under the 25th section of the Judiciary Act, as the decision of the state court was thought to be inconsistent with the Constitution of the United States.

Mr. Justice McLEAN delivered the opinion of the court.

Thomas W. Dorr was convicted before the Supreme Court of Rhode Island, at March term, 1844, of treason against the state of Rhode Island, and sentenced to the state's prison for life. And it appears from the affidavits of Francis C. Treadwell, a counsellor at law of this court, and others, that personal access to Dorr, in his confinement, to ascertain whether he desires a writ of error to remove the record of his conviction to this court, has been refused. On this ground the above application has been made.

Have the court power to issue a writ of *habeas corpus* in this case? This is a preliminary question, and must be first considered.

The original jurisdiction of this court is limited by the Constitution to cases affecting ambassadors, other public ministers, and consuls, and where a state is a party. Its appellate jurisdiction is regulated by acts of Congress. Under the common law, it can exercise no jurisdiction.

As this case cannot be brought under the head of original jurisdiction; if sustainable, it must be under the appellate power.

The 14th section of the Judiciary Act of 1789 provides, "that the courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the Supreme Court, as well as *judges

*105]

of the District Courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment: Provided that writs of *habeas corpus* shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

In the trial of Dorr, it was insisted that the law of the state, under which he was prosecuted, was repugnant to the Constitution of the United States. And on this ground a writ of error is desired, under the 25th section of the Judiciary Act above named. That as the prayer for this writ can only be made by Dorr or by some one under his authority, and as access to him in prison is denied, it is insisted that the writ to bring him before the court is the only means through which this court can exercise jurisdiction in his case by a writ of error. Even if this were admitted, yet the question recurs, whether this court has power to issue the writ to bring him before it. That it has no such power under the common law is clear. And it is equally clear that the power nowhere exists, unless it be found in the 14th section above cited.

The power given to the courts, in this section, to issue writs of *scire facias*, *habeas corpus*, &c., as regards the writ of *habeas corpus*, is restricted by the proviso to cases where a prisoner is "in custody under or by color of the authority of the United States, or has been committed for trial before some court of the same, or is necessary to be brought into court to testify." This is so clear, from the language of the section, that any illustration of it would seem to be unnecessary. The words of the proviso are unambiguous. They admit of but one construction. And that they qualify and restrict the preceding provisions of the section is indisputable.

Neither this nor any other court of the United States, or judge thereof, can issue a *habeas corpus* to bring up a prisoner, who is in custody under a sentence or execution of a state court, for any other purpose than to be used as a witness. And it is immaterial whether the imprisonment be under civil or criminal process. As the law now stands, an individual, who may be indicted in a Circuit Court for treason against the United States, is beyond the power of federal courts and judges, if he be in custody under the authority of a state.

Dorr is in confinement under the sentence of the Supreme Court of Rhode Island, consequently this court has no power to issue a *habeas corpus* to bring him before it. His presence here is not required as a witness, but to signify to the court

whether he desires a writ of error to bring before this tribunal the record of his conviction.

The counsel in this application prays for a writ of error, but *106] as it appears from his own admission that he does not act under the authority *of Dorr, but at the request of his friends, the prayer cannot be granted. In this view it is unnecessary to decide whether the counsel has stated a case, which, with the authority of his client, entitles him to a writ of error.

The motion for a *habeas corpus* is overruled.

EDWARD CURTIS, PLAINTIFF IN ERROR, *v.* WILLIAM MARTIN AND CHARLES A. COE, DEFENDANTS.

An act of Congress imposing a duty upon imports must be construed to describe the article upon which the duty is imposed, according to the commercial understanding of the terms used in the law in our own markets at the time when the law was passed.[1]

The duty, therefore, imposed by the act of 1832 upon cotton bagging, cannot properly be levied upon an article which was not known in the market as cotton bagging in 1832, although it may subsequently be called so.[2]

THIS case was brought up by writ of error from the Circuit Court of the United States for the southern district of New York.

It was an action brought in the court below by Martin and Coe against Curtis, the collector, for return of duties upon certain importations of gunny cloth, from Dundee, in Scotland, from April to September, 1841.

The facts in the case are clearly stated in the following brief of Mr. *Nelson*, attorney-general, who argued the case on behalf of Curtis, the plaintiff in error:—

This was an action brought by the defendants in error

[1] FOLLOWED. *Arthur* v. *Morrison*, 6 Otto, 111. CITED. *Arthur* v. *Cumming*, 1 Otto, 363; *Tyng* v. *Grinnell*, 2 Id., 470.

In ascertaining the meaning of terms used in a tariff act, recourse is had to their meaning, according to the commercial understanding of the terms in our markets at the time the act was passed; and, where it does not appear from the act itself, that some certain meaning is intended by the terms used, they are understood according to the commercial meaning of the terms in our markets at the time the act was passed; but, where it does appear by the act itself, that a particular meaning was intended by the terms used, that particular meaning must be adopted, in giving a construction to the act whatever the commercial meaning of the terms may have been. *Roosevelt* v. *Maxwell*, 3 Blatchf., 391; *United States* v. *Breed*, 1 Sumn., 159, 164; *Elliot* v. *Swartwout*, 10 Pet., 137, 151.

[2] DISTINGUISHED. *Rankin* v. *Hoyt*, 4 How., 334.

against Curtis, as collector of the port of New York, to recover back the sum of $4,543.17 of duties, levied by him on a certain article as cotton bagging, which, they contended, was gunny bagging, a non-enumerated article in the tariff of 1832, and therefore duty free; and the question in the cause was, whether this kind of bagging was cotton bagging within the meaning of the revenue laws? The duties were paid under written protest annexed to each entry.

By the tariff of 1832 it is enacted, that "on cotton bagging three and a half cents a square yard, without regard to the weight or width of the article," of duty shall be collected. This duty, modified by the Compromise Act, was chargeable when the goods were imported.

The imported article, used as bagging for the packing of cotton, is principally manufactured in the town of Dundee, in Scotland, and, like the bagging of Kentucky, was made of hemp, until the material of which the gunny cloth of India is manufactured began to be used. Bagging for cotton has also been made of cotton.

Gunny (Bengalee Gúni) is a coarse, strong sack- [*107
cloth, manufactured *in Bengal, for making into bags, sacks, and packing generally, the material being the fibre of two plants, natives of India, as hemp originally was. (See article "Gunny," in McCulloch's Dictionary of Commerce, American edition, vol. 1, p. 722.)

Gunny bagging is now manufactured in Scotland, as well as in India; and it was admitted, on the part of the defendants in error, that the importations in question came from Dundee, and were made into New York between the months of April and September, 1841.

It was established, by the testimony on both sides, that gunny cloth was imported largely into this country, solely for bagging for the packing of cotton, since 1835. In commercial language it has since been known as cotton bagging; but in 1832, at the time of the passing of the tariff of that year, it was not so known. The counsel for the collector contended, at the trial in the court below, that if the article was, in commercial understanding, known as cotton bagging at the time of its importation, it was subject to the duty, and that the term cotton bagging signified any fabric, without regard to the materials of which it is composed, that was used to bale or cover cotton, and prayed the court so to charge the jury, which his honor refused; but, on the contrary, charged that the point upon which the case turned was, whether the article in question was known as cotton bagging in the year 1832, when the tariff act was passed. He further charged that it

was a settled rule of construction of revenue laws, imposing duties on articles of a specified denomination, to construe the article according to the designation of such articles as understood and known in commerce, and not with reference to the material of which they may be made, or the use to which they might be applied; nor ought such laws to be construed as embracing all articles which might be applied to the same use and purpose as the specific article. If it had been the intention of Congress to impose the duty upon all articles used for cotton bagging, the language of the act would have been different, and in terms prospective, adapted to such purpose; that it had been argued on the part of the United States that the duty was intended to be laid on all articles used for cotton bagging, because the duty is laid on cotton bagging "without regard to weight or measure;" but that the terms "weight and measure" were intended to apply to different materials then in use for bagging cotton, such as hemp, flax, and sometimes cotton cloth, &c., and not to any new articles that might thereafter be applied to that use; so that the whole question was, whether gunny cloth was, in commercial understanding, known as cotton bagging when the law was passed laying the duty, in 1832? If it was not, they would find for the plaintiffs; if it was, they would find for the defendant. To which charge, in every respect, the defendant's counsel excepted.

The jury found for the plaintiffs, now defendants in error.

*108] *The cause now comes up on a writ of error to this court, and for error it is assigned—

That the judge ought to have charged the jury that the act of 1832 was prospective; and that the legislature, in using the term "cotton bagging," without distinguishing the material of which it was made, meant that all articles which thereafter should be imported for that purpose should be subject to duty; and that gunny bagging, being known among merchants as cotton bagging at the time of the importation of the bagging in question, was subject to duty.

Lord, for defendants in error, said that the points in the case were the following:

1. That if gunny cloth was at the time of the passage of the act of July 14th, 1832, in commercial understanding, known as cotton bagging, it was liable to the duty demanded under the 14th clause of the 2d section of the act.

2. But if not so known at the time of the passage of such law, then it was not liable to the duty on cotton bagging.

Whereupon he contended for the two following propositions, viz.:

1st. Under laws imposing duties, articles are to be charged solely according to their commercial designation at the time of the passage of the law, and that whether the designation be of a class or of individual articles. For this he cited 1 Story's R., 341, *Bacon* v. *Bancroft;* Id. 642, *Lee* v. *Lincoln;* 9 Wheat., 434, 438, *United States* v. 200 *chests tea;* 8 Pet., 272, *United States* v. —— *sugar;* 1 Sumn., 159, *United States* v. *Breed;* 10 Pet., 272, *Elliott* v. *Swartwout.*

2d. The construction claimed here by the importers is fully admitted by the government in the act of August 30th, 1842, whereby cotton bagging and gunny cloth are subjected, as distinct articles, to different rates of duty. Acts of 27th Congress, 2d session, p. 180, section 3, clause 3.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case comes before the court upon a writ of error directed to the Circuit Court for the southern district of New York. The action was brought by the defendants in error against the plaintiff, who was the collector of the port of New York, to recover back $4,500, which had been paid, under protest, as duties upon certain goods imported into the port of New York, in April, 1841. The goods in question were gunny cloths, and were charged by the collector as cotton bagging.

The defendants in error offered evidence to show that, in 1832, when the law passed imposing the duty on cotton bagging, the article in question was not used or known as cotton bagging: that it was then only seen in the form of bags for India goods; that the first importation of gunny cloth, to be used as cotton bagging, was in 1834. It is made from the yute grass.

The plaintiff in error proved that these goods, at the [*109 time of the *importation, were known in commerce as cotton bagging; that they were made of the proper width for that purpose, and for several years before this importation, gunny cloths had been imported and used for cotton bagging; and that the goods in question were imported from Dundee, in Scotland.

Upon this evidence, the counsel for the defendant contended that if the jury found that the article gunny cloth was, in commercial understanding, known as cotton bagging at the time of its importation, it was subject to a duty; and that the term cotton bagging, according to the commercial understanding of the phrase, signified any fabric, without regard to the material of which it was made, that was used to bale or cover cotton, and prayed the court so to charge the jury.

His honor the judge refused so to charge the jury; but, on the contrary thereof, charged "that the point upon which this case turns is for the decision of the jury, viz.: whether the article in question in this case was known as cotton bagging in the year 1832, when the tariff act was passed.[1] It has long been a settled rule of construction of revenue laws, imposing duties on articles of a specified denomination, to construe the article according to the designation of such article, as understood and known in commerce, and not with reference to the materials of which they may be made, or the use to which they might be applied. Nor ought such laws to be construed as embracing all articles which might subsequently be applied to the same use and purpose as the specific article. If it had been the intention of Congress to impose the duty upon all articles used for bagging cotton, the language of the act would have been different, and in terms prospective, adapted to such purpose. It has been argued, on the part of the United States, that the duty was intended to be laid on all articles used for bagging cotton, because the duty is laid on cotton bagging "without regard to weight or measure." These terms, "weight or measure," were intended to apply to different materials then in use for bagging cotton, such as hemp, flax, and sometimes cotton cloth, &c., and not to any new articles that might thereafter be applied to that use. So that the whole question of fact for the jury is whether gunny cloth was, in commercial understanding, known as cotton bagging when the law was passed laying the duty, in 1832? If it was not, they will find for the plaintiffs; if it was, they will find for the defendant."

To this charge, in every respect, the defendant's counsel excepted.

The jury found a verdict for the plaintiffs for $4,543.17, and six cents costs.

The question brought up by this exception cannot now be considered as an open one. In the case of the *United States* v. 200 *chests of tea*, 9 Wheat., 438, the court decided that in imposing duties Congress must be understood as describing the article upon which the duty is imposed according to the
*110] commercial understanding of the terms used in the law, in our own markets. This doctrine *was re-affirmed in the case of the *United States* v. 112 *casks of sugar*, 8 Pet., 277, and again in 10 Id., 151, in the case of *Elliott* v. *Swartwout*. It follows that the duty upon cotton bagging must be considered as imposed upon those articles only which were known

[1] FOLLOWED. *Lawrence* v. *Allen*, 7 How., 797.

and understood as such in commerce in the year 1832, when the law was passed imposing the duty.

In the case before us, the Circuit Court followed the rule of construction above stated, and it has been followed also in every circuit where the question has arisen. The judgment is therefore affirmed.

SAMUEL SWARTWOUT, PLAINTIFF IN ERROR, *v.* JOHN GIHON ET AL.

When an importer means to contest the payment of duties, it is not necessary for him to give a written notice thereof to the collector.
The question of notice is a fact for the jury, and it makes no difference, for the purposes for which it is required, whether it is written or verbal.[1]

THE facts in this case are sufficiently set forth in the following opinion.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case comes before the court upon a writ of error directed to the Circuit Court for the southern district of New York. The action was brought by the defendants in error against the plaintiff to recover back certain sums of money paid to him as duties on brown linens, imported into New York in 1836, of which port he was at that time the collector. Some of these duties were paid under protest in writing, and some without any written protest or notice, but evidence was offered for the purpose of showing that the defendants in error verbally notified the collector that the duties charged on all of these goods would be contested. The goods in question were unbleached linens, and had been charged with duty as colored; and the jury found a verdict against the collector for the amount claimed.

At the trial, the court instructed the jury that a written notice of the objections to pay the duty was not necessary, and that it was sufficient if a verbal notice was brought home to the collector; but that the jury must be satisfied that such notice was brought home to him. To this direction the plaintiff in error excepted; and it is upon this point only that the case comes before this court.

The only object of the notice was to warn the collector that

[1] CITED. *Rankin* v. *Hoyt*, 4 How. 332.

the party meant to hold him personally responsible for the money, whether he paid it over or not. It was a question for the jury to decide whether notice was or was not given; and it could make no difference, for the purposes for which it was required, whether it was written or verbal. We think the charge of the court was clearly right, and the judgment is therefore affirmed.

*111] *LESSEE OF HENRY WALLER, ASSIGNEE OF THE BANKRUPT ESTATE OF FRANCIS A. SAVAGE, PLAINTIFF, *v.* JAMES AND JOSEPH BEST.

In Kentucky, the creditor obtains a lien upon the property of his debtor by the delivery of a *fi. fa.* to the sheriff; and this lien is as absolute before the levy as it is afterwards.[1]

Therefore, a creditor is not deprived of this lien by an act of bankruptcy on the part of the debtor committed before the levy is made, but after the execution is in the hands of the sheriff.[2]

THIS case came up from the Circuit Court of the United States for the district of Kentucky, on a certificate of division in opinion between the judges thereof.

The following is the entire record in the case:—

"The following statement of questions and points of law which arose in this case, and the adjournment thereof into the Supreme Court of the United States for decision, was ordered to be entered, to wit:

"Savage had the title to the land; the plaintiff claimed under the decree of his bankruptcy; the defendant, under a sheriff's sale under an execution.

"The act of bankruptcy of Savage was committed on the 27th April, 1842; the petition of his creditors was filed against him in the District Court on the 25th day of June, 1842, and he was declared a bankrupt on the 26th of October, 1842; the plaintiff was appointed the assignee, and this is his title.

"An execution of *fieri facias* on a judgment against the estate of Savage was delivered to the sheriff on the 9th of April, 1842, before the act of bankruptcy, and was levied on the land on the day of before the petition; but after the act of bankruptcy the defendant purchased at the sheriff's sale, had his deed, and this was his title.

"The question was, has the plaintiff, by the decree of bank-

[1] APPLIED. *Peck* v. *Jenness*, 7 How., 620.

[2] CITED. *Brown* v. *Newman*, 66 Ala., 277. See *Norton* v. *Boyd*, *post* *440.

ruptcy and its relation back to the act of bankruptcy, the elder and better title; or has the defendant, by the prior delivery of the execution into the hands of the sheriff, and his levy of it before the petition was filed, the prior and superior title?

"On this question the judges were divided and opposed in opinion; whereupon, on motion of the counsel of the plaintiff, the question is stated and ordered to be certified to the Supreme Court for decision."

Morehead and *B. Monroe*, for the plaintiff.
Richard French, for the defendants.

The argument on behalf of the plaintiff was this:

Two questions arise: 1st. Did Best, the tenant in possession and the plaintiff in the execution under which the sale of the land was made, acquire any lien, such as is recognized by the latter proviso *of the 2d section of the bankrupt law, before the execution was in fact levied? [*112

2d. If any such was acquired, is it effectual against the rights of the assignee of the bankrupt, when the act of bankruptcy was committed before the levy of the execution; or could the execution, in virtue of the lien given by the state law, which was in the hands of a sheriff, but not levied before an act of bankruptcy, be afterwards levied, and the property sold?

These questions render it necessary to look to the character of the lien given by the statutes of Kentucky, in favor of execution creditors, and when that lien commences. The statute of Kentucky (1 Stat. Law, 636) provides "that no writ of *fieri facias*, or other writ of execution, shall bind the estate of the defendant or defendants but from the time such writ shall be delivered to the sheriff or other proper officer to be executed." What is the import of the term *bind*, as used in the statute? That it has some binding effect is evident, but to what extent? Is it a lien within the meaning of the proviso of the bankrupt law? It is insisted that it is not, but is only so far binding as to prevent such disposition of the property by the defendant as will defeat the execution so in the hands of the officer; and does not so far bind the property as to prevent other execution creditors from levying their executions upon the debtor's property. See *Tabb* v. *Harris*, 4 Bibb (Ky.) 229; and *Kelby* v. *Haggin*, 2 J. J. Marsh. (Ky.), 212. In the latter case the court use this language: "The only object of attaching a lien to an execution is to prevent the debtor from defeating the creditor by alienating or embarrassing his estate. The reason of the lien in such a case, does not

apply to competition between creditors, and *cessante ratione cessat lex;* moreover, it is but sheer justice to give the preference to the creditor who by his superior industry and vigilance shall have procured the first levy on the debtor's estate." This interpretation of the statute shows what is the character of that binding spoken of in the statute, and that it does not amount to the lien referred to in the bankrupt law until the execution be in fact levied, when it may be admitted that it amounts to such lien.

2d. The proceeding against Savage was at the instance of a creditor. The act of bankruptcy complained of was committed before any levy of the execution, though the filing of the petition and the decree were subsequent to the levy of the execution of Best. At common law a *fieri facias* had relation to its teste, but by our statute only from the day of its delivery to the officer. According to the adjudications of the English courts, on the bankrupt laws of that country anterior to the 36 George 3 and the 6 George 4, the uniform and well settled doctrine was that the assignee had a right to overhaul all the transactions of the bankrupt subsequent to the first act of bankruptcy, and recover all moneys or property which passed through his hands; but by the 18th section of the 6 George 4, *"all *bona fide* transactions entered into more than two calendar months before the date and issuing the commission against the bankrupt, and all executions and attachments against his lands or chattels *bona fide* executed or levied more than two calendar months before the issuing of the commissions," are made valid, "notwithstanding any prior act of bankruptcy, provided the parties had no notice of it."

*113]

Our bankrupt law has this proviso in the 2d section (1st proviso): "That all dealings and transactions by and with the bankrupt, *bona fide* made and entered into more than two months before the petition filed against him or by him, shall not be invalidated by this act, provided that the other party to any such dealings or transactions had no notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act."

These provisos have no bearing upon the questions involved. No reference is here made to any executions or attachments, as in the English statute, but they are left to be governed by the last proviso of the 2d section.

The binding effect of writs of *fieri facias* in England, by the common law, was from the teste; by the statutes of Kentucky it is from the delivery to the sheriff: but in the character of this binding effect there is believed to be no other distinction but in respect of the time of its commencement. It may be

proper then to learn what was the course of adjudication by the English courts upon this question. In *Cooper* v. *Chitty*, 2 W. Bl., 65; 1 Burr., 20, it is said if a sheriff take goods of a bankrupt in execution after the act of bankruptcy and before commission issued, and sell them after the commission, trover will lie against him.

Again, the sheriff seized the goods of a defendant under a *fieri facias*, and sold and delivered them to the judgment creditor, in satisfaction of the debt, after a secret act of bankruptcy committed by the defendant, but before the issuing of a commission against him: held, that the seizure and sale of the goods was a wrongful conversion, for which the sheriff was liable in an action of trover at the suit of the assignee subsequently chosen. *Balme* v. *Hutton*, 3 Moo. & S., 1; 9 Bing., 471; 1 Car. & M., 262; reversing s. c. Tyrw., 17; 2 Car. & J., 19; 2 Younge & J., 101, held by seven judges K. B. and C. P. (Gaselie, J., *dissentient*); *Price* v. *Helyar*, 1 Bing., 597; 1 M. & P., 541; S. P. *Porter* v. *Starkie*, 1 M. & S., 260; *Blogg* v. *Phillips*, 2 Campb., 129.

Farther, in *Lazarus* v. *Waithman*, 5 Moo., 313, where a trader committed an act of bankruptcy on the 9th of November, and the sheriff took his goods in execution on the 15th November, and sold them on the 21st December, and a commission issued on the 23d, and an assignment made on the 6th January following, it was held, "that the assignee might maintain trover against the sheriff," although he had sold before the assignment was made, as the bankrupt's *property [*114 vested in him by such assignment from the act of bankruptcy by relation.

These authorities are deemed sufficient to show that the binding effect of an execution from its date, in England, was not such as to give the execution creditor any lien or preference over other creditors, unless the execution was in fact levied before the act of bankruptcy; and if not levied, the decree in bankruptcy, by relation, reached back, and effectually passed all the rights of the bankrupt to the assignee, as they existed at the time of the commission of the act of bankruptcy. And there is believed to be nothing in our bankrupt law which requires that it should receive a different interpretation from the English statutes in this particular. The action of some creditor was necessary to bring about the decree in bankruptcy; it is, therefore, the effort of the creditor, not of the defendant in the execution, which brings about the decree. The investiture of the rights of the debtor in the assignee is the act of the law, and the effect of the action of one or more creditors, for his own benefit and that of other creditors; and

the result of this conclusion is, that there is a *pro rata* distribution of the bankrupt's property, rather than the appropriation of the whole to a single creditor.

Is the placing the execution in the hands of the sheriff a dealing by and with the bankrupt, to which the first proviso in the 2d section has reference? It is insisted that it is not. The bankrupt has, in that matter, been passive entirely. There has been no act upon his part, which is to acquire sanctity by the lapse of sixty days, spoken of in this proviso. But in this case sixty days had not elapsed; therefore, this proviso is altogether inoperative.

Although when an execution is levied, and a sale made, the title of the purchaser reaches back, and is protected from any effort of the debtor to pass the title of the property, yet it is not so when two executions are out against the same defendant, in the hands of different officers—that which is first levied will hold, though it be youngest in date; and a levy and sale under that which was first in the hands of the officer, but last levied, will be ineffectual to pass any title to the purchaser. This is the law, as understood by the counsel, in contests between execution creditors in Kentucky: and it is insisted that the case of a petitioning creditor in bankruptcy is analagous to that of an execution creditor, and that the filing of the petition by a creditor is tantamount to the levy of an execution: it is a proceeding by which a lien is acquired by the assignee, for the benefit of the general creditors, and will oust any such inchoate lien as that relied on as arising from an execution not in fact levied.

The assignee had his election to sue the sheriff or to sue the purchaser of the land; and having elected to sue the purchaser of the land, who was the plaintiff in the execution levied thereon, and having shown title and right of possession, the judgment should be for the assignee, for the possession of the land.

*115] **French*, for defendants.

The question on which the court below divided was, whether the title acquired by purchase under an execution which came to the hands of the sheriff before the act of bankruptcy, and was levied after the act of bankruptcy, but before filing of petition in bankruptcy, related back to the time the execution came to the hands of the sheriff, and overreached the title of the assignee in bankruptcy; or, was the title of the assignee the better title?

The defendants rely on the last proviso in the 2d section of the bankrupt law, which protects "any liens, mortgages, or

other securities on property, real or personal, which may be valid by the laws of the states respectively."

That an execution, delivered to the proper officer, constitutes a lien on defendants' property, and that title acquired by purchase under such execution relates back to the time of delivery, is a proposition most clearly settled by judicial decision in Kentucky. In *Million* v. *Ryley*, 1 Dana (Ky.), 359, execution was delivered to sheriff, June 16th, and was levied August 5th. On the intermediate July 22d, defendant sold and conveyed. Held, that execution acquired a lien from June 16th, and that purchaser's title related back to that time. He recovered, therefore, in ejectment against the vendee of execution debtor.

In *Clagett* v. *Force*, 1 Dana (Ky.), 428, after execution delivered, defendant removed a horse to Indiana, and sold him there. The purchaser brought the horse to Kentucky, where he was levied on by the same execution, delivered as aforesaid. Held, that the lien was not lost by the removal to Indiana, and sale there; and, therefore, that the horse was subject to the execution.

Orchard v. *Williamson*, 6 J. J. Marsh. (Ky.), 561; after execution delivered, defendant swapped a horse for another. Both were levied on: and held, that both were subject, one by virtue of the lien, and the other as the property of defendant.

Addison, &c. v. *Crow*, 5 Dana (Ky.), 274; levying an execution has the effect of rendering the lien more specific, and of continuing the lien and authority of the sheriff; further than this, it had no greater efficacy than placing the execution in the hands of the sheriff. Neither the delivery nor the levy divests the defendant of title: he may sell and pass the title, still the execution is a lien or charge on the land, and when completed by sale, the title relates back to the delivery, and overreaches all intermediate conveyances.

Hood, &c. v. *Winsatt*, 1 B. Mon. (Ky.): after execution delivered, property was removed to another county. The execution was returned on the return day, and another one issued to the county to which the property had been removed, and was placed in the hands of the sheriff of that county the same day. Held, that the lien was continued from the delivery of the original execution.

Having referred to a few of the Kentucky cases, which hold, without *the shadow of doubt, that an execution delivered acquires a lien, I shall notice some of the [*116 decisions in which the above recited proviso of the 2d section of the bankrupt law is brought under review.

The leading case is that of *Ex parte Foster*, 5 Law Rep., 55.

The question judicially decided in this case was, that by the laws of Massachusetts a party proceeding by attachment did not acquire a lien on the attached property until judgment, and that a petitioner in bankruptcy could enjoin proceedings on the attachment, until it was ascertained whether the bankrupt obtained his certificate. If he did, he could plead the certificate in bar of the attachments, and thus defeat the inchoate lien.

The profession generally, however, understood the case differently, and supposed the effect of it would be to cut off all judgment liens, execution liens, even though levied, vendors' liens, &c., from all benefit under the proviso above referred to. This case, thus understood, was relied on as authority before other judges, and first before Judge Conkling, of New York, in the case, *In the matter of Allen and others*, 5 Law Rep., 363.

In this case judgment creditors had attached choses in action. The court sustained the lien acquired by the attachment, evidently inclining to a broader definition of the liens embraced by the proviso in question than was given in *Ex parte Foster*.

The next case is *Downer and others* v. *Bracket*, 5 Law Rep., 392, before Judge Prentiss, of Vermont. He discusses the subject ably and at large, declaring his opinion that every kind of lien, unless fraudulent, to wit, the vendor's lien, attachment liens, judgment liens, &c., are protected,—pp. 394, 396. Attachment binds as effectually as judgment or execution issued. Judgment or execution issued binds all the property of debtor, &c. *Grosvenor* v. *Gold*, 9 Mass., 209, is referred to, to show that the lien of judgment, execution issued, and attachment, all stand on the same ground.

In *Haughton* v. *Eustice*, 5 Law Rep., 505, Judge Thompson, of Vermont, decided that an attachment lien was protected by the proviso in question. He expressed the opinion that judgment liens, and such similar liens, were protected.

That the case of *Foster* was greatly misapprehended is evident from the subsequent decisions of Judge Story.

Thus, in the case of *Parker and Blanchard*, plaintiffs in *Matter of Muggridge, &c.*, 5 Law Rep., 351, after judgment, Judge Story maintained the lien by attachment; because, after judgment there could be no day in court to plead the discharge. He also expressed the opinion that judgment liens were protected by the proviso in question.

In the case, *The matter of Cook*, 5 Law Rep., 443, Judge Story expressed surprise that the case of *Foster* had been so much misunderstood, and in this latter case sustains the lien of the attaching creditors, who had obtained judgment, declar-

ing that this lien was equivalent *to the common law judgment lien, adding, that he never doubted that that lien was protected.

All the judges, then, to whose opinions I have referred, concede that judgment liens are protected; and Judge Prentiss places judgment liens and executions issued on the same footing.

I will endeavor, further, to show that the lien of execution issued is fully equivalent to the judgment lien.

Land by the common law, as it originally stood, was not, except under some peculiar circumstances, subject to the debts of the owner. 2 Bac. Abr. tit. *Execution*, A, 685; 3 Black. 418.

The judgment lien on land arises from the construction of the statute of Edward 1, chap. 18, commonly called the statute of Westminster. See *Ex parte Foster*, 5 Law Rep., 63, 67.

It was by this statute the eligit was given, by virtue of which the judgment creditor has his election to take a *fieri facias* for the sale of goods and chattels, or the eligit to extend the goods and chattels and one-half the land. See 2 Bac. Abr. tit. *Execution*, A, 686; 3 Black. 418.

This statute does not expressly give any lien, but only authorizes the creditor, at his election, to sue out the eligit directed to the sheriff, and the command of the writ as prescribed is, that the sheriff shall levy the debt of the goods and chattels, and one-half the land. See form of writ, 2 Bac. Abr. tit. *Execution*, C, 710.

It is by construction of this statute, the writ relates back to the judgment, and overreaches all intermediate encumbrances.

In like manner, at common law, the *fieri facias*, which commanded the sheriff to levy the debt of the goods and chattels, related back to its teste, and bound from that time. 2 Bac. Abr. tit. *Execution*, I, 733; as judgments did from time of judgment, same title, 731.

By 29th Charles 2, the statute of frauds, (the same from which the Kentucky statute is copied,) executions only bind from the time they are delivered. 2 Bac. Abr. tit. *Execution*, I, 733.

Judgments docketed, and executions delivered, are evidently, in Bacon, at the pages cited, (731, 733,) placed on the same footing.

They seem to be placed on the same footing in the case of *Foster*, 5 Law Rep., 63, 67.

There are some other striking analogies between judgments and executions issued, which I will notice.

An execution, as conceded, does not vest a title until exe-

cuted, neither does a judgment. *Ex parte Foster*, 5 Law Rep., 64. Covenant of seisin is not broken by outstanding judgment. *Sedgwick* v. *Hollenback*, 7 Johns. (N. Y.), 380.

As between execution plaintiffs, he that by superior diligence acquires the first levy is preferred; so between judgments of the same date, he that first sues execution and sells, acquires a preference. *Adams* v. *Dyer*, 8 Johns. (N. Y.), 350; *Watterman, &c.*, v. *Haskins*, 11 Id., 230.

*118] *Sale under junior execution, if first levied, would be valid; so is sale under junior judgment. *Sanford* v. *Roosa*, 12 Johns. (N. Y.), 162.

To conclude, then, the title of the assignee can only relate back to the act of bankruptcy. The title of the defendants, as we have seen by the cases of *Million* v. *Ryley*, 1 Dana (Ky.), 359, and *Addison, &c.*, v. *Crow*, 5 Id., 274, relates back to the time the execution was delivered to the sheriff. This period being anterior to the act of bankruptcy, the title of the defendants is older than that of the plaintiff.

2d. All the authorities concurring in the opinion, that judgment liens are protected by the proviso in the 2d section, and the analogies between the judgment lien and execution issued being so striking, I would respectfully maintain, that the title of the defendants is also protected by the proviso referred to.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case comes before the court upon a certificate of division between the judges of the Circuit Court of the United States for the district of Kentucky, upon the following statement:—

"Savage had the title to the land; the plaintiff claimed under the decree of his bankruptcy; the defendant, under a sheriff's sale under an execution.

"The act of bankruptcy of Savage was committed on the 27th April, 1842; the petition of his creditors was filed against him in the district court on the 25th day of June, 1842, and he was declared a bankrupt on the 26th October, 1842; the plaintiff was appointed the assignee, and this is his title.

"An execution of *fieri facias* on a judgment against the estate of Savage was delivered to the sheriff on the 9th April, 1842, before the act of bankruptcy, and was levied on the land on the day of before the petition; but after the act of bankruptcy the defendant purchased at the sheriff's sale, had his deed, and this was his title.

"The question was, has the plaintiff, by the decree of bank-

ruptcy and its relation back to the act of bankruptcy, the elder and better title; or has the defendant, by the prior delivery of the execution into the hands of the sheriff, and his levy of it, before the petition was filed, the prior and superior title?"

The statute of Kentucky, upon this subject, provides "that no writ of *fieri facias*, or other writ of execution, shall bind the estate of the defendant or defendants but from the time such writ shall be delivered to the sheriff, or other proper officer, to be executed." According to the laws of that state a judgment is not a lien upon land, and the real as well as personal estate is not bound until the process of execution against the property of the defendant is delivered to the officer. The question to be determined is, whether the delivery of the *fieri facias* to the sheriff to be executed created a lien on the property of the defendant, for the amount for which the execution was *issued? If it did, the title [*119 of the defendant is the superior and better title, and protected by the last proviso in the 2d section of the act to establish a uniform system of bankruptcy throughout the United States.

In construing the statute above mentioned, the decisions of the courts of Kentucky have not been entirely uniform. In the case of *Tabb* v. *Harris*, 4 Bibb (Ky.), 29, decided in 1816, it was held, that the delivery to the sheriff created no lien on the property of the defendant. In a subsequent case, however, in the same volume, *Daniel* v. *Cochrane's administrator*, 4 Bibb (Ky.), 532, decided in 1817, the court, in delivering their opinion, speak of the lien of a *fieri facias*, from the time it was delivered to the sheriff to be executed, as if it were a known and settled principle of law in that state. But this was not the main point in that case, which turned upon the question, whether the execution continued to bind the property of the debtor until the judgment was satisfied. The court held that it did not, and that the lien ceased after the return day of the execution, if it was not levied before. The question, as to the lien acquired by the delivery to the officer, again arose in the case of *Kilby* v. *Haggin*, 3 J. J. Marsh. (Ky.), 208, and in this case, which was decided in 1830, the doctrine in the case of *Tabb* v. *Harris* was fully sustained; and it was directly and distinctly decided, that the delivery to the sheriff created no lien against any other creditor, and that an execution afterwards placed in the hands of the sheriff, if first levied upon the property, was entitled to a preference.

But in the case of *Million* v. *Ryley*, 1 Dana, (Ky.), 360, decided in 1833, the court held, that the plaintiff obtained a lien by the delivery to the sheriff, and that the title acquired

by the purchaser, when the execution was regularly levied and the property sold, related back to the delivery to the officer; and they speak of this lien as secured to the creditor by the Kentucky statute. In 1837 this subject again came before the court, in the case of *Addison and others* v. *Crow and others*, 5 Dana, (Ky.), 274, and in this case the question appears to have been very fully considered, and the case of *Million* v. *Ryley* was referred to and commented on, and the principle decided in it in relation to the lien of an execution re-affirmed. In this case the court say "the levy of a *fieri facias* upon the land of the debtor undoubtedly renders the lien more specific, and being a necessary step in the execution of a writ, completes the authority of the officer to sell, and has the further effect of giving continuance both to the authority and the lien, which would otherwise expire with the return of the writ. And we do not perceive any necessity or reasonable ground for ascribing to it any other efficacy than this;" and in page 277 of the same case, the court again say, "no reason appears for attributing to a levy any efficacy except as one step towards the consummation of the lien arising from the delivery of the execution to the officer."

*120] *This is the latest decision in the courts of the state to which we have been referred, or of which we are aware, and, as we have already said, it appears to have been well considered. And whatever doubts might before have been entertained, we must, under the authority of this case, regard it as the settled law of the state, that the creditor obtains a lien upon the property of his debtor by the delivery of the *fieri facias* to the sheriff; that it acquires no additional validity or force by being actually levied, but that the lien is as absolute before the levy as it is afterwards, and continues while the process remains in the hands of the sheriff to be executed.

In this view of the subject it is unnecessary to examine or to remark upon the cases which have been decided in other states or in England, because the question depends altogether upon the law of Kentucky. And as by the laws of that state a *fieri facias*, when delivered to the sheriff, is a lien upon the property of the debtor while it continues in the hands of the officer to be executed, the creditor is not deprived of this lien by an act of bankruptcy on the part of the debtor committed before the levy is made, but after the execution is in the hands of the sheriff. In the case before us, therefore, the court are of opinion that the defendant, by the prior delivery of the execution and the subsequent levy and sale, has the prior and

superior title, and we shall certify accordingly to the Circuit Court.

THE UNITED STATES, PLAINTIFF, *v.* HEZEKIAH H. GEAR, DEFENDANT.

THE UNITED STATES, COMPLAINANT, *v.* HEZEKIAH H. GEAR, DEFENDANT.

The act of Congress entitled "An act to create additional land districts in the states of Illinois and Missouri, and in the territory north of the state of Illinois," approved June 26th, 1834, does not require the President of the United States to cause to be offered for sale the public lands containing lead mines situated in the land districts created by said act.

The said act does not require the President to cause said lands, containing lead mines, to be sold, because the 5th section of the act of the 3d March, 1807, entitled "An act making provision for the disposal of the public lands situated between the United States military tract and the Connecticut reserve, and for other purposes," is still in full force.

The lands containing lead mines in the Indiana territory, or in that part of it made into new land districts by the act of the 26th June, 1834, are not subject, under any of the pre-emption laws which have been passed by Congress, to a pre-emption by settlers upon the public lands.

The 4th section of the act of 1834 does in no way repeal any part of the 5th section of the act of the 3d March, 1807, by which the lands containing lead mines were reserved for the future disposal of the United States, by which grants for lead-mine tracts, discovered to be such before they may be bought from the United States, are declared to be fraudulent and null, and which authorized *the President to lease any lead mine which had *121] been, or might be, discovered in the Indiana territory, for a term not exceeding five years.

The land containing lead mines, in the districts made by the act of 1834, are not subject to pre-emption and sale under any of the existing laws of Congress.

Digging lead ore from the lead mines upon the public lands of the United States is such a waste as entitles the United States to a writ of injunction to restrain it.[1]

THESE two cases came up from the Circuit Court of the United States for the district of Illinois, and involved the right of Gear, the defendant, to a tract of land upon which there was a lead mine. The first was an action of trespass *quare clausum fregit* on the common law side of the court; and the second a bill in chancery, with a prayer for an injunction to stay waste, on the equity side. The declaration charged Gear with having broke and entered the north half

[1] RELIED ON. *Cotton* v. *United States*. 11 How., 232.

In *United States* v. *Parrott*, McAll., 271, it is decided that the working of a gold mine is the taking away the substance of the estate; and an injunction was granted. As to pre-emption, see *United States* v. *Ames*, 1 Woodb. & M., 76.

section 23, township 29 north, range 1 east, and the south half of fractional section 8, township 28 north, range 1 east, both being east of the fourth principal meridian, and then and there dug up the mineral lead ore, &c., &c.

The defendant filed six pleas, all resting on the ground that he had settled, resided on, and occupied the land in question in the year 1827, and cultivated a part thereof, and had ever since remained, continued, and still was in possession thereof, and was lawfully entitled to the pre-emption right to said quarter section; said premises being subject to pre-emption rights, and not yet offered for sale by the President's proclamation; by reason whereof he, the defendant, dug lead ore or mineral, as he might lawfully do, &c., &c.

To these pleas the plaintiffs replied, in substance, that the quarter-section of land was, and always had been, the property of the plaintiffs; that it contained a valuable lead mine, the existence of which was well known to the defendant before and at the time he settled upon the land, &c.

To these replications the defendant demurred generally, and the plaintiffs joined in the demurrer.

The same principles were involved in the chancery case, alleged, of course, in a different manner.

When the cause came up for argument, in the court below, the judges were divided in opinion, and the questions duly certified to this court. They are somewhat differently stated in the two cases, and it is proper to mention both.

In the chancery case they are thus stated:

1. Whether the act of Congress, entitled "An act to create additional land districts in the states of Illinois, Missouri, and the territory north of the state of Illinois," approved June 26th, 1834, so far repeals the 5th section of the act of the 3d of March, 1807, entitled "An act making provision for the disposal of the public lands situated between the United States military tract and the Connecticut reserve, and for other purposes," as to subject the lands mentioned in said act of
*122] June 26th, 1834, containing lead mines, to be entered and *purchased by pre-emption under any of the pre-emption laws of Congress?

2. Whether the said act (1834) requires the President of the United States to cause lands containing lead mines to be sold, or only authorizes him to do so in his discretion?

3. Whether lands containing lead mines are subject to be held or purchased under any of the acts of Congress granting the rights of pre-emption to settlers upon the public lands?

4. Whether the digging lead ore from the lead mines upon the public lands of the United States is such a waste as en-

titles the United States to the allowance of a writ of injunction to restrain?

In the common law case they are thus stated:

1. Does the act of Congress, entitled "An act to create additional land districts in the states of Illinois and Missouri, and in the territory north of the state of Illinois," approved June 26th, 1834, require the President of the United States to cause to be offered for sale the public lands situate in the land district created by said act, containing lead mines?

2. Does the said act require the President to cause said lands, containing lead mines, to be sold, notwithstanding the 5th section of the act of the 3d of March, 1807, entitled "An act making provisions for the disposal of the public lands situated between the United States military tract and the Connecticut reserve, and for other purposes?"

3. Are the said lands, containing lead mines, subject to pre-emption under any of the pre-emption laws which have been passed by Congress?

4. Does the 4th section of the said act of 1834 so far repeal the 5th section of the act of 1807, as to subject the public lands containing lead mines to be sold by the United States in the same manner as other public lands not containing lead mines?

5. Are the said lands, containing lead mines, subject to pre-emption or sale under any of the existing laws of Congress?

The acts of Congress referred to are the following:—

On the 3d of March, 1807, an act was passed, (1 Land Laws, 162,) by the 5th section of which it was enacted, "That the several lead mines in the Indiana territory, together with as many sections contiguous to each as shall be deemed necessary by the President of the United States, shall be reserved for the future disposal of the United States; and any grant which may hereafter be made for a tract of land containing a lead mine, which had been discovered previous to the purchase of such tract from the United States, shall be considered fraudulent and null. And the President of the United States shall be, and he is hereby, authorized to lease any lead mine which has been, or may hereafter be, discovered in the Indiana territory, for a term not exceeding five years."

[*123 *At that time the land now included within the state of Illinois was part of the Indiana territory.

In 1827, Gear, the defendant, entered upon the north half of section 23, township 29 north, of range 1 east, erected a house upon it, cultivated and occupied it.

On the 29th of May, 1830, Congress passed "An act to grant

pre-emption rights to settlers on the public lands," the first section of which was as follows:

"That every settler or occupant of the public land prior to the passage of this act, who is now in possession, and cultivated any part thereof in the year 1829, shall be, and he is hereby, authorized to enter with the register of the land-office for the district in which such lands may be, by legal subdivisions, any number of acres, not more than one hundred and sixty, or a quarter-section, to include his improvement, upon paying to the United States the then minimum price of said land: Provided, however, that no entry or sale of any land shall be made, under the provisions of this act, which shall have been reserved for the use of the United States, or either of the several states in which any of the public lands may be situated."

The 4th section declared, that the sale of the public lands should not be delayed, nor should the act be available for those who failed to make proof and payment, and concluded as follows:

"Nor shall the rights of pre-emption contemplated by this act extend to any land which is reserved from sale by act of Congress, or by order of the President, or which may have been appropriated for any purpose whatsoever."

The act was to remain in force for one year after its passage.

On the 5th of April, 1832, Congress passed an "act supplementary to the several laws for the sale of the public lands," which permitted the public lands to be purchased either in entire sections, half-sections, quarter-sections, half quarter-sections, or quarter quarter-sections, and contained three provisions, the third of which was as follows:

"Provided further, that all actual settlers, being house keepers, upon the public land, shall have the right of pre-emption to enter, within six months after the passage of this act, not exceeding the quantity of one-half quarter-section, under the provisions of this act, to include his or their improvements, under such regulations as have been, or may be, prescribed by the Secretary of the Treasury," &c.

On the 14th of July, 1832, Congress passed "An act supplemental to an act granting the right of pre-emption to settlers on the public lands, approved on the 29th of May, 1830," which is too long to be quoted. The purport of it was to extend to occupants and settlers the privilege granted by the prior act until one year after the surveys had been made, or the land had been attached to a particular land district.

*124] On the 2d of March, 1833, an act was passed reviving that of *April 5th, 1832, extending the privileges granted by that act to the same period as those just mentioned,

and placing the beneficiaries of the two acts of the 5th of April and 14th of July upon the same footing.

In 1834, two acts were passed, one on the 19th and one on the 26th of June. That of the 19th was to revive the act to grant pre-emption rights to settlers on the public lands, approved May 29th, 1830.

The 1st section declared, that every settler or occupant of the public lands prior to the passage of the act, who was then in possession, and cultivated any part thereof in the year 1833, should be entitled to all the benefits and privileges provided by the act of 29th May, 1830; which act was revived and continued in force for two years.

The act of the 26th June was entitled "An act to create additional land districts in the states of Illinois and Missouri, and in the territory north of the state of Illinois."

The 4th section enacted, "that the President shall be authorized, as soon as the survey shall have been completed, to cause to be offered for sale, in the manner prescribed by law, all the lands lying in said land districts, at the land-offices in the respective districts in which the land so offered is embraced, reserving only section 16, in each township, the tract reserved for the village Galena, such other tracts as have been granted to individuals and the state of Illinois, and such reservations as the President shall deem necessary to retain for military posts, any law of Congress heretofore existing to the contrary notwithstanding."

On the 22d of June, 1838, an act was passed, the title of which was "An act to grant pre-emption rights to settlers on the public lands." It enacted that every actual settler of the public lands, being the head of a family, or over twenty-one years of age, who was in possession and a house-keeper, by personal residence thereon at the time of the passage of the act and for four months next preceding, should be entitled to all the benefits and privileges of the act of May 29th, 1830; which act was thereby revived and continued in force for two years. It contained a number of provisions, one of which was, that it should not be so construed as to give a right of pre-emption to any land specially occupied or reserved for town-lots or other purposes by authority of the United States.

By the act of the 1st June, 1840, the above act was continued in force until the 22d of June, 1842, subject to the exceptions therein contained.

On the 4th of September, 1841, an act was passed entitled "An act to appropriate the proceeds of the sales of the public lands, and to grant pre-emption rights."

The 10th section granted pre-emption rights to actual set-

tlers, with several limitations and exceptions, two of which
*125] were as follows, viz.:
*"No lands included in any reservation by any treaty, law, or proclamation of the President of the United States, or reserved for salines or for other purposes," and "no lands on which are situated any known salines or mines, shall be liable to entry under and by virtue of the provisions of this act."

Nelson, attorney-general, for the United States.
Hardin, for the defendant.

Nelson. The early acts of Congress upon the subject are all stated in Mr. Gilpin's argument, 14 Pet., 529. The act of 1807 reserves all lead mines. If that act is still in force the case is clearly within it, because the replication avers the existence of a lead mine on this tract of land, and it is not controverted. If the case is withdrawn from the operation of that act, it must be through the effect of some one of the pre-emption laws. Let us inquire.

By the act of 1830, 1 Land Laws, 473, 474, chap. 401, there is no right of pre-emption in lands reserved from sale.

That of 1832 cannot apply, because there is nothing in the record to show that the defendant made an application for this land, and thus brought himself within the provisions of the act.

That of 1834 merely revived the act of 1830. Of course the same restriction was continued; and by that of 1838 it was continued for two years longer.

By the act of 1841, Session Acts, p. 26, chap. 16, section 10, no land is to be entered on which lead mines are.

In no act is there a pre-emption right varying from that given by that of 1830, except in the law of 1832, which says it shall be subject to such conditions as the Secretary of the Treasury should impose. But, in making these conditions, it was his duty to conform to the settled policy of the country.

These acts may then be laid aside, as having no bearing on the case. The one under which the controversy arises is that passed in 1834. At this session, two acts were passed, viz.: 1834, chap. 467, passed on 19th June; 1834, chap. 527, passed on 26th June.

The 4th section of the latter act is the clause to which the attention of the court should be directed. It authorizes the President to offer for sale the lands therein mentioned, with certain exceptions; and it is contended, on the part of the defendant, that lead mines are not named in the exceptions, and that, consequently, the right of pre-emption accrued.

The question is, does this act repeal that of 1807, and authorize the President to sell without regard to the restrictions imposed upon him by the act of 1807? I think not; because,

1. The act of 1834 was not designed to bear upon that of 1807. It had a different object in view, professing to establish land-offices. There were two laws passed at that session, one seven days after the other. The one first passed provided for pre-emptions, and reserved *lead mines. [*126 Is it probable that these provisions would be repealed by a law passed a few days afterwards, and purporting to regulate an entirely different matter?

2. In every subsequent act, of 1838, 1840, 1841, there is the same reservation as in 1830, which is a strong legislative exposition of the meaning of Congress. In the distribution law, it is repeated; and the practice of the executive department has always been to refuse to grant such lands.

3. There is another legislative interpretation. In 1842 (chap. 190) an act was passed, including Wisconsin in the act of 1834. Those who had entered lead mines were indemnified, and allowed to enter other lands, provided they did not violate the act of 1830.

4. By the section of 1834 under consideration, the President might offer the lands for sale, but it was not incumbent on him to do so. He had a discretionary power, which carried with it the right to refuse to sell them at the minimum price of one dollar and twenty-five cents per acre. See opinion of Attorney-General Butler, 2 Land Laws, 127, 128.

In 14 Peters, 526, the court has decided this question. In that case the contract for leasing was made after 1834. It is true, that the act was not noticed in the argument, but this shows the opinion to have been then, that the act had nothing to do with the subject. It was argued by Mr. Benton upon a different ground.

But suppose that the President was authorized to sell these lands. How does the right of pre-emption follow? This is a matter regulated by Congress only. Does the act of 1834 give a right of entry before the lands are offered at public sale? The act of 1830 might have thrown open all lands, then in the market, to pre-emption rights; but it does not follow that that of 1834 did so too.

As to the propriety of granting an injunction in the equity case, on the ground that the bill alleges, that the injury will be irreparable, see 2 Land Laws, 17; 3 Wheat., 131; 2 Story Eq., 207, 208; Dewey on Injunctions, 137, 183, 184, 112.

Hardin, for defendant.

The act of 1807 reserved lead mines from sale, but left them subject to the future action of Congress. They were not appropriated to any particular purpose: no plan was adopted for their subsequent government. All that was done by that act was to say, that at some time thereafter Congress would consider what course should be taken with regard to them. They were, therefore, just as much open to the legislation of Congress as any other portion of the public lands. If an appropriation of them had been made, to take immediate effect, the case would have been different; for there is a distinction between reservation and appropriation. Grants made by executive officers were declared void; but this was not intended to guide future congressional action. By the act of *127] 1830, pre-emption rights are given *in the broadest sense, except where lands are reserved for the United States. But they were often reserved for canals, light-houses, &c. As long as the act of 1807 was in force, we admit, that the act of 1830 did not give a right of pre-emption to the land in question, because it was reserved from sale. But the act of April 5th, 1832, permits quarter quarter-sections to be entered, and extends the privilege to all house-keepers, who had settled on the public lands, in the broadest possible terms. The defendant's plea shows him to have been entitled to claim it. There was no reservation in the act. It has been said, by the attorney-general, that no settlement could be made on lands which had not been offered for sale, and that the Secretary of the Treasury must prescribe regulations. But the very term implies a recognition of a settlement thus made. What is it? Pre-emption: a right to purchase before the day of public sale. Before the passage of such a law, a settler was an intruder; but afterwards, he had an estate upon condition. And if he complied with the act, he fulfilled the condition, and the estate became absolute. It has been called a gift. But if so, it was a gift under a legislative grant, which, in effect, vests the title, of which a subsequent patent is only the evidence. 2 Kent, 255; 4 Pet., 408, 422; 2 How., 816, 844.

Being so, it was not in the power of the President or any executive officer to take it away.

If we look to results, they are all in our favor. The object of Congress, in making the original reservation, was to prevent monopoly, but not the general settlement of the country. The leasing system has not paid expenses, and it injures the land. The Secretary of War has, for many years, recommended that the lead mines should be sold; and we say, that

Congress has ordered it, but that the President has improperly withheld them from sale.

By the act of 26th June, 1834, the President was authorized to sell the public lands with certain reservations, and these are not within the reservations. But the attorney-general says, that the President was only authorized to sell; that it was a matter within his discretion. Be it so. This removes them from the list of reservations; and being no longer reserved, the pre-emption law of the 19th June comes in and operates upon them. What construction must be given to the word "authorized?" We say, it makes it the duty of the President to sell.

It is not only used so in the act of 26th June, 1834, but in all acts in which Congress directs or authorizes land to be sold by order of the President. As in these acts: February 17th, 1818, sect. 3, Land Laws, 294; March 3d, 1823. sect. 10, Land Laws, 364; July 14th, 1832, sect. 2, Land Laws, 511; July 7th, 1838, sect. 1, Land Laws, 578; March 3d, 1815, sect. 5, Land Laws, 260; May 6th, 1812, sect. 1, Land Laws, 214.

Congress never does order the President in imperative terms. The *language is courteous; but it is a ministerial act to proclaim the lands for sale. *Grignon* v. *Astor*, 2 How., 344. [*128

This power can be exercised by other officers than the President; and in the following cases other subordinate officers are authorized, *alias* directed, to make sales, &c.: Secretary of War, March 3d, 1803, sect. 2, Land Laws, 99; Secretary of Treasury, March 3d, 1825, sect. 1, Land Laws, 403; registers and receivers, April 27th, 1816, sect. 1, Land Laws, 274; April 30th, 1810, sect. 1, Land Laws, 176; "proper officer," May 13th, 1800, sect. 1, Land Laws, 78; "commissioners," July 14th, 1832, sect. 2, Land Laws, 510. See also, acts 23d August, 1842, sect. 2, Acts, 124; 4th August, 1842, sect. 1, Acts, 83; 10th May, 1842, sect. 1, Acts, 14.

These lead-mine lands being authorized to be sold, without any reservation, and no power existing in the President to reserve them from sale, more than any other public lands, so much of the law of 1807, as "reserved them for the future disposal of the United States," was necessarily repealed by the act of 1834. The reservation being taken off, they become subject to rights of occupancy, as other lands, and settlers acquiring rights to pre-emption, by virtue of pre-emption laws, cannot be divested of these rights by the refusal of the President to proclaim them for sale.

If the pre-emption laws, passed prior to the act of 1834, did not give the defendant a right of pre-emption, the pre-emption

law of 1838 did. This act makes no mention of reserving lead mines. It is provided in this act, that it shall not extend "to any land specially occupied or reserved for town lots, or other purposes, by authority of the United States."

These lead-mine lands were not occupied or reserved for any purpose by the United States. They were, in 1807, reserved from sale for future disposal; but nowhere are they appropriated or reserved for the use of the government, to dig mineral, or other special use. The object of the original reservation was to delay the sale until Congress should determine what disposition should be made of them. By the law of 1834, and the various pre-emption laws, Congress has authorized their sale and disposal, and they are not, consequently, within the meaning of any reservation or appropriation mentioned in the subsequent pre-emption laws.

On all public lands, authorized to be sold, citizens are permitted and encouraged, by the pre-emption laws, to go on them and improve them. To do so, they must erect houses, break up the natural meadow, and fell trees. These are all acts of waste, according to the common law.

The old acts of Congress against waste, and to punish for trespasses in cutting timber, &c., are inconsistent with these pre-emption laws, and the rights and privileges granted to occupants under them; consequently, they are repealed by the pre-emption laws subsequently passed. Neither action can therefore be sustained.

*129] **Nelson*, in reply and conclusion.

The question of a general reservation does not arise in the case. The replication sets out, that defendant knew that mines were on the land; and by his demurrer he admits that he knew it. The act of 1807 reserves mines, and declares, that all grants of them shall be considered fraudulent and null. Under this act alone, the defendant would have been a trespasser, even if he had obtained a grant of the land.

It has been said, that the district-attorney had no right to bring suit without the authority of an act of Congress. But the Constitution makes it the duty of the President to see that all laws are executed, and the power to sue results from the nature of things.

The act of 1830 is the first and general pre-emption law; and no law, now in force, is inconsistent with this. It says that its provisions do not apply to lands which were reserved from sale; but the act of 1807 had already reserved these lands.

The act of April, 1832, has no application. It was not

designed as a pre-emption law, but to allow smaller sub-divisions than had been before tolerated. The claim here is not for one of these sub-divisions, but an entire quarter-section. But the privilege granted by the act of 1832 is confined to half quarter-sections, and extends to no larger amount.

The act of July, 1832, merely gave an extension of time.

The act of 1834 appears to be the chief reliance of the defendant. We admit, that if the court think that this act grants the lands, the plaintiff is not entitled to maintain this suit. But it does not profess to be a pre-emption act. It is to create additional land-districts. It authorizes the President to do certain things in the manner prescribed by law. But a pre-emptioner can only claim under an act of Congress, and this act does not give him power to enter, which is expressly prohibited by the act of 1830. It does not follow that any pre-emptioner may take up lands as soon as their sale is authorized. No statute gives him such a right. The question is, what was the intention of Congress in passing this law? The answer must be sought in the act itself, and in the circumstance that, seven days before, a regular pre-emption law had been passed.

The act of 1838 contains many reservations, and it is argued that mines are not included within them. But the general phrase, "for other purposes," will include mines; and besides, it professed to revive the act of 1830, with all its reservations.

Mr. Justice WAYNE delivered the opinion of the court.

From the foregoing statement of all the acts of Congress having any bearing on the subject before us, we think it obvious it was not intended to subject lead-mine lands in the districts made by the act of the 26th June, 1834, to sale as other public lands are sold, or to make them liable to a pre-emption by settlers.

*The argument in support of a contrary conclusion [*130
is, that the reservations in the fourth section of that act, with the authority given to the President to sell all the lands in the districts, any law of Congress heretofore existing to the contrary notwithstanding, exclude lead-mine tracts in those districts from the operation of the act of the 3d of March, 1807. At most, the language of the fourth section of the act of 1834 imparts only an authority to the President to sell, given in the same way as it has been conferred upon him in other acts providing for the sale of the public lands. Then the question occurs, whether the section of an act, in general terms to sell, (certain reservations excepted,) without any reference to a previous act, which declares that lead mines

in the Indiana territory shall be reserved for the future disposal of the United States, is so far a repeal of the latter, that lead-mine lands in a part of that territory are subjected to sale as other public lands are. Why should Congress, without certain words showing an intention to depart from the policy which had governed its legislation in respect to lead-mine lands in the whole of the Indiana territory, from 1807 to 1834, be supposed to have meant to exempt a portion of the lead-mine lands in that territory from that policy, in an act, the whole purview of which was to create additional land-sale districts? Besides, the reservations in the fourth section of the act of 1834, except the tract for the village of Galena, are no more than the reaffirmance of some of the provisions of other statutes respecting reservations made or to be made out of the public lands in other districts; and cannot, therefore, be considered as an enumeration in connection with the general power to sell all lands, any law of Congress heretofore existing to the contrary notwithstanding, repealing another act, providing for a reservation of a particular class of lands within the same land-district to which the act of 1834 applies. The reservations in the fourth section of the act of 1834 are limitations upon the authority to sell, and not an enlargement of the general power of the President to sell lands, which, by law, he never had a power to sell; which have always been prohibited by law from being sold, and which never have been sold, except under the authority of a special statute, such as that of the 3d March, 1829, 1 Land Laws, 457, which authorized the President to cause the reserved lead mines in the state of Missouri to be sold. In looking at that act, no one can fail to observe the care taken by the government to preserve its property in the lead-mine lands, or to come to the conclusion that the reservations of them can only be released by special legislation upon the subject-matter of such reservations. Authority, then, to sell all lands in the districts made by the act of 1834, though coupled with the concluding words of the fourth section, can only mean all lands not prohibited by law from being sold, or which have been reserved from sale, by force of law. The propriety of this interpretation of that section is more manifest, when it is considered, if a contrary interpretation *is given, that the lead-mine lands in one district of the same territory would be liable to sale and pre-emption, and those in another part of it would not be. Can any one possible reason be suggested to sustain even the slightest intention upon the part of Congress, when it was passing the act of 1834, to make such differences in respect to lands within the same locality, as have just been mentioned?

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Could Congress have meant to say, under a power to sell, that it would be lawful to sell in the new land district what it was unlawful to sell in other land districts of the same territory of which the new land district was also a part? And that settlers upon the public lands within the new district should have a right of pre-emption in lead-mine tracts, which settlers upon other lands within the same territory, but not within the new land district, could not have? The mere fact of a new land district having been made out of a part of the territory in which the lead-mine lands had been reserved, with the authority to the President to sell all lands in the new district, can have no effect to lessen the force of the original reservation. In truth, the acts of 1834 and 1807 do not present a case of conflict in the sense in which statutes do, when, from some expression in a later act, it may seem that something was intended to be excepted from the force of the former, or to operate as a partial repeal of it. The rule is, that a perpetual statute, (which all statutes are unless limited to a particular time,) until repealed by an act professing to repeal it, or by a clause or section of another act directly bearing in terms upon the particular matter of the first act, notwithstanding an implication to the contrary may be raised by a general law which embraces the subject-matter, is considered still to be the law in force as to the particulars of the subject-matter legislated upon. Thus in this case, all lands within the district mean lands in which there are, and in which there are not, minerals or lead mines; but a power to sell all lands, given in a law subsequent to another law expressly reserving lead-mine lands from sale, cannot be said to be a power to sell the reserved lands when they are not named, or to repeal the reservation. In this case there are two acts before us, in no way connected, except in both being parts of the public land system. Both can be acted upon without any interference of the provisions of the last with those of the first—each performing its distinct functions within the sphere as Congress designed they should do. But further, that the act of 1834 was not intended as a repeal of the act of 1807, in regard to lead mines, so as to grant a right of pre-emption in them to settlers, is manifest from the fact that an act was passed only seven days before it, reviving an act to grant pre-emption rights to settlers on the public lands, which excludes settlers from the right of pre-emption in any land reserved from sale by act of Congress. Thus reasserting, then, what had been uniformly a part of every pre-emption law before, and what has been a limitation upon the right of pre-emption in every act for [*132
*that purpose since. We do not think it necessary to

pursue the subject further, except to say that the view we have here taken of the act of 1834, in respect to lands containing lead mines, and the right of pre-emption in them, is coincident with the opinion given by this court in the case of *Wilcox* v. *Jackson*, 13 Pet., 513. That case was well and most carefully considered, and expressed in the deliberate language of this court. We determined, then, the point being directly in the cause, that the act of 1834 had relation to a sale of lands in the manner prescribed by law, at public auction, and that a right of pre-emption was governed by other laws. The court said, "the very act of 19th June, 1834, under which this claim is made, was passed but one week before the one of which we are now speaking, (meaning the act of 26th June, 1834,) thus showing that the provisions of the one were not intended to have any effect upon the subject-matter on which the other operated." We see no reason to change what was then the view of the court. On the contrary, there is much in this case to confirm it. Let it be certified, therefore, to the judges of the Circuit Court of the United States for the district of Illinois, that this court is of the opinion that the act of Congress, entitled "An act to create additional land-districts in the states of Illinois and Missouri, and in the territory north of the state of Illinois," approved June 26, 1834, *does not require* the President of the United States to cause to be offered for sale the public lands *containing lead mines* situated in the land districts created by said act. 2d. That the said act does not require the President to cause said lands, containing lead mines, to be sold, because the 5th section of the act of the 3d March, 1807, entitled "An act making provision for the disposal of the public lands, situated between the United States military tract and the Connecticut reserve, and for other purposes," is still in full force.

To the third question we reply, that the lands containing lead mines in the Indiana territory, or in that part of it made into new land-districts by the act of the 26th June, 1834, are not subject, under any of the pre-emption laws which have been passed by Congress, to a pre-emption by settlers upon the public lands.

To the 4th question, we reply that the 4th section of the act of 1834 does in no way repeal any part of the 5th section of the act of the 3d of March, 1807, by which the lands containing lead mines were reserved for the future disposal of the United States, by which *grants* for lead-mine tracts, discovered to be such before they may be bought from the United States, are declared to be fraudulent and null, and which authorized the President to lease any lead mine which had been, or might

be, discovered in the Indiana territory, for a term not exceeding five years.

To the 5th question we reply, that the lands containing lead mines in the districts made by the act of 1834, are not subject to pre-emption and sale under any of the existing laws of Congress.

*The foregoing answers apply also to the points upon [*133 which the judges were divided in opinion upon the bill in chancery, between the United States and the defendant Gear, except the fourth question certified in that case; and to that we reply, that digging lead ore from the lead mines upon the public lands in the United States, is such a waste as entitles the United States to a writ of injunction to restrain it.

[For the dissenting opinion of Mr. Justice McLEAN, see App. p. 800.]

SAMUEL GORDON, PLAINTIFF IN ERROR, *v.* THE APPEAL TAX COURT.

JAMES CHESTON, PLAINTIFF IN ERROR, *v.* THE APPEAL TAX COURT.

The charter of a bank is a franchise, which is not taxable, as such, if a price has been paid for it, which the legislature accepted.[1]

[1] CITED. *Home of the Friendless* v. *Rouse*, 8 Wall.. 438; *Salt Co.* v. *East Saginaw*, 13 Id., 376; *Erie R'y Co.* v. *Pennsylvania*, 21 Id., 498.

For the case in the state court, see 5 Gill, (Md.), 231. When a certain sum or an annual charge is paid or contracted to be paid, as the consideration for the grant of a franchise, the contract is a limitation upon the taxing power, and no further tax can be imposed upon the franchise. Any tax is a substantial addition to the price paid for the use of the privilege. *Attorney General* v. *Bank of Charlotte*, 4 Jones, (N. C.), Eq., 287; *Minot* v. *P. W. & B. R. R. Co.*, 2 Abb. (U. S.), 323; s. c. 18 Wall., 206; 7 Phil. (Pa.), 555; *Mayor* v. *B. & O. R. R. Co.*, 6 Gill, (Md.), 288.

And where the charter stipulates that the corporation shall pay certain taxes annually in lieu of all taxes to which it would otherwise be subject, the amount of taxes cannot be subsequently increased. *State* v. *Auditor*, 5 Ohio St., 444; *Rose County Bank* v. *Lewis*, 5 Id., 447; *Farmers' Bank* v. *Commonwealth*, 6 Bush, (Ky.), 126; *Le Roy* v. *East S. C. R. W. Co.*, 18 Mich., 233; *Mechanics' Bank* v. *Debolt*, 1 Ohio St., 591; s. c. 18 How., 380; *State* v. *Commissioners*, 8 Vr. (N. J.), 240; *State* v. *Commercial Bank*, 7 Ohio, 125; *Jefferson Bank* v. *Skelly*, 9 Ohio St., 606; s. c. 1 Black, 436; *Matheny* v. *Golden*, 5 Ohio St., 361. CONTRA. *Toledo Bank* v. *Bond*, 1 Ohio St., 622; *Exchange Bank* v. *Hines*, 3 Id., 1; *Sandusky Bank* v. *Wilbor*, 7 Ohio, 481.

A stipulation in the charter that the property of the corporation shall be exempt from taxation bars all right to assess or levy a tax thereon. *Washington University* v. *Rouse*, 42 Mo., 308; s. c. 8 Wall., 439.

A mere reservation in a charter of a sum to be paid annually does not contain an implied contract that no further tax shall be imposed. *State* v. *Retway*, 2 Jones, (N. C.), Eq., 396;

But the corporate property of the bank is separable from the franchise, and may be taxed, unless there is a special agreement to the contrary.[2]

Minot v. *P. W. & B. R. R. Co.* 2 Abb. (U. S.), 323: *Erie R. R Co.* v. *Commissioners*, 3 Brewst. (Pa.), 368; *Delaware R. R. Tax*, 7 Phil. (Pa.), 555; s. c. 18 Wall., 206; *State* v. *Parker*, 3 Vr. (N. J.), 426; *Evansville H. & N. R. R. Co.* v. *Commonwealth*, 9 Bush, (Ky.), 438; *Louisville C. & L. R. R. Co.* v. *Commonwealth*, 10 Id., 43.

A provision fixing the particular mode in which taxes are to be assessed does not preclude changing the mode. *State* v. *Hannibal & St. Joseph R. R. Co.*, 60 Mo., 143.

If there is no consideration for the exemption of the tax the clause of exemption may be repealed. *Hospital* v. *Philadelphia*, 24 Pa. St, 229; *Holly Springs S. & I. Co.* v. *Marshall*, 52 Miss., 281; *State* v. *County Treasurer*, 4 Rich., (S. C.), 520; *People* v. *Commissioners*, 47 N. Y., 501; s. c. 53 Barb., 70; *St. Louis, I. M. & S. R. Co.* v. *Loftin*, 30 Ark., 693; *Sandusky Bank* v. *Wilbor*, 7 Ohio St., 481.

When property is given to a corporation for a certain purpose and there then exists a statute enacting that property so given shall be exempt from taxation, it cannot be taxed as long as it is applied to the purpose for which it was given; for the statute is a contract with the donors under which the property was given, and no subsequent legislation can divert the right thus vested in the society. *Atwater* v. *Woodbridge*, 6 Conn., 223; *Osborne* v. *Humphrey*, 7 Id., 335; *Landon* v. *Litchfield*, 11 Id., 251; *Seymour* v. *Hartford*, 21 Id., 481; *Parker* v. *Redfield*, 10 Id., 490. CONTRA. *Herrick* v. *Randolph*, 13 Vt., 525; *Brainerd* v. *Colchester*, 31 Conn., 407; *Lord* v. *Litchfield*, 36 Id., 116.

If a tax is to be levied only upon the happening of a certain event, no tax can be levied prior to that time. *McGavish* v. *State*, 5 Vr. (N. J.), 509.

An exemption of the capital of the corporation extends to additional capital, although increased under subsequent vote. *State* v. *N. & W. R. R. Co.*, 30 Conn., 290.

In Missouri it is said that an exemption from state tax is not an exemption from municipal tax. *Paris* v. *Farmers' Bank*, 30 Mo., 575; *Pacific R. R. Co.* v. *Cass*, 53 Id., 17; *Livingston* v. *H. & St. J. R. R. Co.*, 60 Id., 516; *Lexington* v. *Ault*, 30 Id., 480; but in New Jersey and Mississippi it is held that the state cannot authorize a municipality to levy a tax it cannot itself levy. *Camden & Amboy R. R. Co.* v. *Hillegas*, 3 Harr. (N. J.), 11; *Same* v. *Commissioners*, Id., 71; *O'Donnell* v. *Bailey*, 24 Miss., 386; so in Virginia, *City of Richmond* v. *R. & D. R. R. Co.*, 21 Gratt., 604; and in Maryland, *Mayor* v. *B. & O. R. R. Co.*, 6 Gill, 288; and North Carolina, *Bank of Cape Fear* v. *Edwards*, 5 Ired., 516; and in South Carolina, *State Bank* v. *Charleston*, 3 Rich., 342.

[2] DISAPPROVED *in dissenting opinion. State Bank of Ohio* v. *Knapp*, 16 How., 401, (see *Ibid*, 386). CITED. *West River Bridge Co.* v. *Dix*, 6 How., 542.

When the charter exempts property used for the *actual* and *necessary* purposes of the corporation, a tax may be levied upon land leased to others, which is not used for the purposes of the corporation. *State* v. *Love*, 8 Vr. (N. J.), 60; but if used conjointly with others, it cannot be. *State* v. *Betts*, 4 Zab. (N. J.), 555. If conveyed with a reservation of annual rent, the property conveyed is taxable. *New Haven* v. *Sheffield*, 30 Conn., 160; *Brainard* v. *Colchester*, 31 Id., 407; *Lord* v. *Litchfield*, 36 Id., 116.

The exemption of the property of a corporation includes all which is obviously appropriate and convenient to carry the franchise granted into effect. *State* v. *Hancock*, 6 Vr. (N. J.), 537; s. c. 4 Id., 315; *State* v. *Woodruff*, 7 Vr. (N. J.), 94; but only to these purposes, *State* v. *Newark*, 2 Dutch. (N. J.), 519; s. c. 1 Id., 315; *Cook* v. *State*, 4 Vr. (N. J.), 474; *State* v. *Collector*, 9 Vr. (N. J.), 270; *State* v. *Collector*, 7 Vr. (N. J.), 519; *State* v. *Powers*, 4 Zab. (N. J.), 400; *State* v. *Blundell*, Id., 402; *State* v. *Flavell*, Id., 370; *Vermont Central R. R. Co.* v. *Burlington*, 28 Vt., 193; *State* v. *Georgia R. R. & B. Co.*, 54 Ga., 423.

The corporation may accept and reject a part of the exemption, *State* v. *Commissioners*, 8 Vr. (N. J.), 240.

A renewal of the charter does not

Gordon v. Appeal Tax Court.

The legislature of Maryland, in 1821, continued the charters of several banks to 1845, upon condition, that they would make a road and pay a school tax. This would have exempted their franchise, but not their property, from taxation.

But another clause in the law provided, that upon any of the aforesaid banks accepting of and complying with the terms and conditions of the act, the faith of the state was pledged not to impose any further tax or burden upon them during the continuance of their charters under the act.

This was a contract relating to something beyond the franchise, and exempted the stockolders from a tax levied upon them as individuals, according to the amount of their stock.[a]

THESE were kindred cases, brought up by writ of error from the Court of Appeals of the state of Maryland, under the 25th section of the Judiciary Act of 1789.

The first case depended upon the constitutionality of a tax imposed by the legislature of Maryland in 1841, it being alleged to be in violation of a contract made by the legislature in 1821; and the second depended upon the same circumstance, with the addition that the plaintiff in error was entitled to the benefit of the same contract, by virtue of an act of the General Assembly, passed in 1834.

The facts in the case were these;—

At November session, 1804, the legislature of Maryland incorporated the Union Bank of Maryland. Samuel Gordon,

renew the exemption unless expressly so stated. *State* v. *Bank*, 2 Houst. (Del.), 99.

Exempting the corporation does not exempt its bonds. *State* v. *Bronin*, 3 Zab. (N. J.), 484; but the shares of the stockholders are exempt, Id.; *State* v. *Powers*, 4 Zab. (N. J.), 400; *State* v. *Bentley*, 3 Id., 532. So it has been held that if the stock is exempt the property of the company is also. *Ordinary* v. *Central R. R. Co.*, 40 Ga., 646; *New Haven* v. *City Bank*, 31 Conn., 106; *Tax Cases*, 12 Gill & J. (Md.), 117; but not the dividends, *State* v. *Petway*, 2 Jones (N. C.) Eq., 396.

In *Municipality* v. *Commercial Bank*, 5 Rob. (La.), 151, it is held that the exemption of the capital does not exempt the company's property. But exempting the *corporation* from taxation also exempts its property as well as its franchises. *Camden & Amboy R. R. Co.* v. *Commissioners*, 3 Harr. (N. J.), 71; even a so called privilege tax, *Grand Gulf & P. B. R. Co.* v. *Buck*, 53 Miss., 246. If the land is exempt the buildings erected upon it are exempt. *Osborne* v. *Humphrey*, 7 Conn., 335.

An exemption from taxation exempts the corporation from assessments for damages and expenses in opening streets assessed without regard to benefits. *State* v. *Newark*, 8 Vr. (N. J.), 185; see *St. Paul & Pac. R. R. Co.* v. *St. Paul*, 21 Minn., 526. But it has been held that the exemption from taxation and assessments does not apply to assessments of benefits for opening streets. *State Home Society* v. *Mayor*, 6 Vr. (N. J.), 157; *City* v. *Society*, 4 Zab. (N. J.), 385; *Mayor* v. *Proprietors*, 7 Md., 517; *Sheehan* v. *Good Samaritan Hospital*, 50 Mo., 155.

When the stock is exempt from taxation, no tax can be levied on a branch road which the corporation legally builds. See *Hewitt* v. *New York & Oswego Midland R. R. Co.*, 12 Blatchf., 452.

[a] APPLIED. *Jefferson Branch Bank* v. *Skelly*, 1 Black, 446. FOLLOWED. *Ohio Life Ins. &c. Co.* v. *Debolt*, 16 How., 429; *Farrington* v. *Tennessee*, 5 Otto, 690. NOT IN CONFLICT. *People* v. *The Commissioners*, 4 Wall., 259. CITED. *Planters' Bank* v. *Sharp*, 6 How., 332.

the plaintiff in error in the first case, was, at the institution of the suit below, a stockholder in this bank. No bonus was required to be paid to the state, but five thousand shares were reserved for the use and benefit of the state of Maryland, to be subscribed for by the state, when desired by the legislature thereof. The charter was to last until 1816.

At the session of 1812, the legislature passed an act, entitled "An act to incorporate a company to make a turnpike road leading to Cumberland, and for the extension of the charters of the several *banks in this state, and for other purposes." It proposed to extend the charters of the banks to 1835, upon condition, that they would subscribe for as much stock as would raise a fund necessary and sufficient to finish and complete the road, and upon the further condition, should bind themselves to pay into the Treasury the sum of $20,000 for each and every year that the charters should continue; the fund being pledged for the support of common schools.

*134]

The 12th section was as follows:

"That upon any of the banks in this state complying with the conditions of this act, the faith of the state is hereby pledged not to impose any further tax or bonus on the said banks during the continuation of their charters under this act."

This act was not accepted by any of the banks.

At the session of 1813, the legislature passed another act, which was entitled a supplement to the aforegoing. The 1st section incorporated a company to make the road. The second was as follows: "And for the purpose of raising a fund to make and complete said road: Be it enacted, That the charters of the several banks, &c., shall be, and they are hereby continued and extended to the 1st day of January, 1835, and to the end of the session of the General Assembly next thereafter, upon condition of the said several banks subscribing, in proportion to their respective capitals actually paid in at the time of such subscriptions, for as much stock as is necessary and sufficient to finish and complete said road," &c., &c.

The 7th section enacted, that every bank should pay annually into the Treasury the sum of twenty cents on every hundred dollars of the capital stock actually paid in; and if this were neglected for six months after it was due, the bank so neglecting should forfeit its charter.

The 8th section continued the charters of such banks as complied with the act until 1835.

The 11th section ran thus: "That upon any of the aforesaid banks accepting of and complying with the terms and

conditions of this act, the faith of the state is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act; and in case of the acceptance of and compliance with the provisions of this act by the several banks hereby required to make the aforementioned road, the faith of the state is further solemnly pledged to the several existing banks in the city of Baltimore, not to grant a charter of incorporation to any other banking institution to be established in the city or precincts of Baltimore before the 1st day of January, 1835."

At the session of 1815, an act was passed, "declaring the continuation and extension of the charters of the several banks therein mentioned." It recited, that several banks, and amongst them the Union Bank, had accepted the act of 1813, and then declared, that their charters were extended to 1835.

*At the session of 1821, another act was passed, entitled "An act to incorporate a company to make a turnpike road from Boonsborough to Hagerstown, and for the extension of the charters of the several banks in the city of Baltimore, and for other purposes." The preamble was as follows: "Whereas it is to the interest of the state that a turnpike road should be made, leading from Boonsborough to Hagerstown, in Washington county, and it is represented to the legislature, that the banks hereinafter mentioned are willing to make the same, if an extension of their several charters be granted to them, as they were heretofore extended by an act entitled a supplement to the act entitled, an act to incorporate a company to make a turnpike road, leading to Cumberland, and for the extension of the charters of the several banks in the city of Baltimore, and for other purposes, passed at December session, 1813: Therefore, Be it enacted," &c. [*135

The 1st section incorporated a company to make the road.

The 2d section was as follows: "And for the purpose of raising a fund to make and complete said road, Be it enacted, That the charters of the several banks aforesaid shall be, and they are hereby, continued and extended to the 1st day of January, 1845, upon condition of the said several banks subscribing, in proportion to their respective capitals actually paid in at the time of such subscriptions, for as much stock as is necessary and sufficient to finish and complete said road," &c.

The 6th section was as follows: "That if the said company shall not commence the making of the said turnpike road within two years from the passage of this act, and shall not complete the same in four years thereafter, the right of the said company to the said road shall revert to the state of Mary-

land, and the charters of the said banks are hereby declared not to be continued or extended by virtue of this act."

The 7th section enacted, that the banks should annually pay to the treasurer the sum of twenty cents on every hundred dollars of the capital stock of each bank actually paid in; and in case of neglect, the bank was to forfeit its charter.

The 8th section renewed and continued the charters of the complying banks until 1845, and the session of the General Assembly next thereafter.

The 11th section was as follows: "That upon any of the aforesaid banks accepting of and complying with the terms and conditions of this act, the faith of the state is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act; and in case of the acceptance of and compliance with the provisions of this act by the several banks hereby required to make the aforementioned road, the faith of the state is further pledged, to the aforesaid banks in the city of Baltimore, not to grant a charter of incorporation to any other banking institution to be established in the city or precincts of Baltimore before the 1st day of January, 1845."

*136] *The 12th section was as follows: "That the said banks, specified in the 7th section of this act, should they elect so to do, shall be, and they are hereby, exempt from the payment of the annual tax hereby imposed, upon condition of their paying to the treasurer of the Western Shore of Maryland, on or before the 1st day of January, 1823, the sum of $100,000, to be appropriated in the manner herein before provided for."

The Union Bank, as was admitted in the court below, duly accepted and complied with the terms and conditions of this act of 1821.

At the session of the legislature of December, 1834, an act was passed (chap. 274) to "extend the charters of several banks in the city of Baltimore," by which, amongst other enactments, the charter of the Union Bank was extended to the end of the year 1859. It introduced some new provisions into the charter, required the payment of the school tax and a proportionate share of $75,000; but contained no stipulation like that of the 11th section of the act of 1821.

At the session of December, 1835, the Farmers' and Planters' Bank was incorporated. It was required to pay a bonus and school tax, but the charter contained no exemption from taxation.

At the same session, viz., December, 1835, an act (chap. 142) was passed, reciting that whereas, by the 11th section of

the act of 1821, the faith of the state was pledged not to impose any further tax or burden upon certain banks, and it was equitable that other banks should stand on equal footing, and enacting that the faith of the state was pledged not to impose any further or other tax on banks incorporated since the year 1821 than might be imposed on the banks which had complied with the terms of that act.

The 3d section was as follows: "And be it enacted, That in the said act of 1821, it was not, nor is it now, the intention of the General Assembly of Maryland, to exempt from taxation and equitable contribution to the common burdens for state purposes, the property, stock, or dividends severally held in or derived from any bank in this state, by any person or persons whatever; but that the true intent and meaning of the pledge given by the said act of Assembly was, to limit the taxation upon the franchises only of the banks therein mentioned."

In April, 1841, an act was passed "for the general valuation and assessment of property in this state, and to provide a tax to pay the debts of the state." It directed, amongst other things, that "all stocks or shares owned by residents of this state in any bank, institution, or company incorporated in any other state or territory: all stocks or shares in any bank, institution, or company incorporated by this state," &c., should be assessed, and a tax imposed upon this and all other species of property, of twenty cents, or one-fifth of one per cent. on every hundred dollars of assessable property. It also provided for an Appeal Tax Court, whose decisions should be carried to the Court of Appeals.

*In the trial of the cause in the Court of Appeals, [*137
the following agreement was filed:—

"It is agreed, that the appellant banks, to wit, the Union Bank of Maryland, the Bank of Baltimore, the Mechanics' Bank of Baltimore, the Commercial and Farmers' Bank of Baltimore, the Marine Bank of Baltimore, and the Farmers' and Merchants' Bank of Baltimore, commonly called the old banks, were chartered previous to the year 1821; and that the new banks, to wit, the Merchants' Bank of Baltimore, the Farmers' and Planters' Bank of Baltimore, the Citizens' Bank of Baltimore, and the Western Bank of Baltimore, were chartered since the year 1830; the respective periods of the incorporation of all the aforegoing banks appearing by reference to their charters.

"It is admitted, that the old banks have duly accepted and complied with the terms and conditions of the act of 1821, chap. 131, the manner of which acceptance appears by the

paper marked A, herewith filed; and have also accepted and complied with the provisions of the act of 1834, chap. 274: and it is also admitted, that taxes have always, since the incorporation of said banks, been levied and assessed upon their real and personal property in all the cities and counties of this state, in the same manner as upon property of the same kind belonging to individuals, and that said taxes have always been paid by said banks up to this time. And it is further admitted, that said banks did not, at the time of the enactment of the act of 1841, chap. 23, nor have they at any time since, paid or redeemed their notes or other obligations in specie."

The Court of Appeals decided, that the tax imposed by the act of 1841 was not a violation of the contract between the state and the banks, which was effected under the act of 1821, and to review this opinion the writ of error was brought.

Meredith and *Dulany*, for the plaintiffs in error.
Nelson, attorney-general, and *Steele*, for the defendants.

In the case of Samuel Gordon, the counsel for the plaintiff in error contended,

1. That the Union Bank of Maryland having accepted of and complied with the terms and conditions of the act of 1821, chap. 131, a contract was created by the 11th section thereof, on the part of the state, "not to impose any further tax or burden upon said bank during the continuance of its charter under the 8th section of said act;" and that this exemption from taxation extended to all the property of said bank, real and personal.

2. That the 1st and 45th sections of the act of 1841, chap. 23, imposed upon the said bank "a further tax and burden," in violation of the said contract, and was therefore void as against the provisions of the Constitution of the United States.

*138] And in the case of *James Cheston, plaintiff in error*, v. *The Appeal *Tax Court*, who was a stockholder in the Farmers' and Planters' Bank of Baltimore, one of the new banks chartered since 1830, the counsel for said Cheston contended,

That if the aforesaid assessment law of 1841, so far as it imposes a further tax upon the stockholders of the old banks, should be declared void for its repugnance to the Constitution of the United States, then, that it is equally void, so far as it imposes an additional tax upon James Cheston, a stockholder of one of the new banks, as it thereby deprives the new banks of the immunity from further taxation granted to them by the

1st section of the act of 1835, chap. 142, which immunity is itself a franchise, granted for a valuable consideration, and cannot, therefore, be taken away.

Dulany, for the plaintiffs in error, said, that he would not stop to cite authorities to show, that the law was void, if it impaired the obligation of a contract, but would refer to two cases which were analogous to the present: 7 Cranch, 154; 4 Peters, 561.

He then entered into a detailed examination of the charter of the Union Bank with its several supplements, and asked the court to compare the 11th section of the act of 1821 with the act of 1841, and he thought it would be found, that the latter took away what the former gave. It was admitted, that there was an exemption of some kind in the act of 1821, and the only question in the case was, what kind of exemption was it?

In Dwarris on Statutes, 51, 9 Law Library, it was said, that every word of a statute must have its effect; that it was better to observe what the legislature said than what they are supposed to have meant. Apply this to the paragraph, coupled with the doctrine that in Maryland property is not taxed, but persons are. 1 Maxcy's Laws, 12, Declaration of Rights, article 13, shows this. The exemption was then a pledge given to a person, viz., the bank. Why should it be limited, as contended for by the opposite side, to an exoneration of the franchise merely from taxation? The construction ought to be in favor of the banks, because it was the intention of the legislature to invite them to accept the law. If you narrow it down now, it is not the spirit in which the offer was made. It is easy to see what that spirit was. The two objects of promoting internal improvement and fostering public schools were great public objects, and it was very desirable to encourage them without resorting to direct taxation. The banks were the invited party, and the act was to be laid before the stockholders for approval or rejection. Of course, the terms would be closely looked at. The proposition was, that no "further" tax should be imposed. The word "further" refers to the preceding section, in which the tax for the road and schools is provided. It is true, that the act of 1841 imposed a tax upon the property; but the tax for road and schools fell upon the very same property, and, as it happened, was of just the same amount. A further tax of the *same character [*139 was meant. The object to which the money is to be applied makes no difference in the character of the tax. The clause is clear in itself, and we are not to look to the preamble, as a guide to intention, unless there is some ambiguity. Dwarris

on Stat., 19. And if we look to the preamble, it will not enlighten us, because it only refers to the road, without saying any thing about schools. If the exemption related only to the franchise, it was worth nothing, because whether the tax should be laid on the franchise or the property of the bank, the same people would pay it in either case. The legislature could have derived the same amount by taxing property as if they taxed the franchise; and to hold, that they were at liberty to do so, of course, renders the exemption of the franchise worthless. There are two decisions upon similar words: 2 Harr. (Ky.), 78, 79, 80; 7 Dana (Ky.), 342.

True, the banks have heretofore paid taxes upon their real property, but the amount was trifling, and the stock was not taxed as now. Besides, their consent does not furnish a rule by which we are to construe the law.

It is said, on the other side, that the contract of exemption was made with the bank and not the stockholders; and by the act of 1841 only the latter are taxed. But what is a corporation? Only the union of certain persons, with power to sue, &c. 4 Pet., 552; Angell & Ames on Corp. 1, 3, 5.

The name is only the legislative baptism of the stockholders. Natural persons are the substratum of the corporation; they receive all its benefits. They pay the taxes, and yet we are told, that a contract for the benefit of the corporation does not reach them. They were the persons who accepted the law in a general meeting, and not the bank, acting as a corporation. What is the difference between taxing them in the gross and taxing them individually?

As to the *case of Cheston*. He is a stockholder of the Farmers' and Planters' Bank, one of what are called the new banks, chartered in 1836. The act of March, 1836, chap. 142, puts these on the same footing with the old banks. The 3d section, it is true, says that the exemption relates only to franchises; but the legislature had no right to deprive, by law, the banks of a benefit which they had already acquired under a contract. And the words "without violation," &c., show that the legislature did not intend to take away any such benefit.

The tax of 1841 clashes with the exemption. It is laid on every thing which constitutes the property of the bank, because in a schedule every thing, even the franchise, goes to make up the aggregate value of the stock, and the tax is laid on the cash value of the stock. By the 17th section, the assessors are directed to value it at the market price. But the market price is governed by the value of all the different species of property held by the bank, including even the franchise, because a purchaser looks at all these, when about to

*invest. It is impossible to separate that portion of the tax which falls upon the franchise, and as the legislature has covered the whole, the entire tax must fall.

Steele, for the defendants in error, contended,

1. That the contract between the State of Maryland and the Union Bank of Maryland, created by the act of 1821, chap. 131, and continued by the act of 1834, chap. 274, exempted from taxation, not the property of said bank, nor the shares of its stock in the hands of individual stockholders, but its corporate franchises, and their exercise during the continuance of its charter.

2. That the tax imposed by the act of 1841, chap. 23, being a tax upon the shares of stock owned by individual stockholders, was not a violation of the contract between the state and the bank, and was, therefore, not unconstitutional.

In the *case of James Cheston*, a tax was imposed and assessed under the same act of 1841, chap. 23, on the shares of stock owned by the plaintiff in error in the Farmers' and Planters' Bank of Baltimore—a bank chartered since 1830, and not included in the provisions of the act of 1821, chap. 131, and the act of 1834, chap. 274.

In this case, the counsel for the defendant in error contended,

That the plaintiff in error was entitled to no immunity from taxation upon his shares of stock in said Farmers' and Planters' Bank of Baltimore, either under the acts of Assembly, herein before mentioned, or under the act of 1835, chap. 142.

Mr. *Steele* said, the Appeal Tax Court is the nominal defendant only; the real one is the state of Maryland. The act of 1841, chap. 33, is a general tax upon all property; not on banks alone, but every species of property. The Court of Appeals decided that it did not conflict with the act of 1821. Is it not a rule that this court will adopt a state's construction of its own laws?

In this case it is not correct to construe the contract favorably to the banks. On the contrary, the rule is to construe strictly any provision which imposes a limit upon the taxing power. 4 Pet., 503, *Prov. Bank* v. *Billings*. 11 Pet., 546—548, carries the rule still further.

Such a rule is necessary to protect the community from improvident legislation. Another rule is, that where there are two constructions, that one is adopted which will produce the least injury. It has been said that our construction, exempting franchises only, renders the whole nugatory, because the franchises would have been safe from taxation without such

exemption. But not so. Being the creatures of law, they are peculiarly appropriate for the taxing power. 4 Wheat., 699; 12 Mass., 252; 4 Pet., 526.

A charter makes a bank a person to carry on a business; but it must be carried on in the same way that other persons do. Suppose a pre-existing law had taxed banks, would a subsequent charter have *been exempt? No—because the laws would not conflict with each other. Nor do they conflict when the charter is passed first.

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It has been said that the exemption is clear. But the section itself refers to the preceding part of the law, and the legislature, twice, in 1835 and 1841, put the same construction on it as we do. The 7th section and all preceding ones provide for an extension of charters. It was right to exempt the franchises, because the legislature was dealing with that subject; but why should they go beyond that, and exempt private property to an extent that they were not aware of? The state was not in want of money, nor was there a motive in the banks to purchase such an exemption as that contended for. No one then anticipated what has since come to pass. Taxes were light, and always paid. The act of 1813 contains the same clause, when there did not exist any system of taxation. Up to 1841, the state had never taxed bank stock or choses in action, and the taxes upon real or other property did not amount to the fourth part of 20 cents. A proposition, therefore, to exempt stock which had never been taxed at all, upon the payment of four times the amount which other property paid, would have been considered a strange one. The tax of 20 cents must have been imposed upon the franchise. The compensation for extending the charters was that the banks would make the road, and for future exemption of the franchise was that they should pay 20 cents towards the school fund. The word "further" means another tax like that one; and if the tax imposed was upon the franchise, a further one upon the same thing was all that was intended to be prohibited.

Look at the cotemporaneous exposition of the law by both parties. County and city taxes were paid by the banks; and not only so, but a small state tax, levied in 1822 upon real property, was paid by them also. Other banks were incorporated in 1833, 1834, and 1835, which pay the 20 cents without any thing being granted except the charter. The act of 1835 gives the new banks an exemption upon the franchise, and nothing more. In the case in 2 Harr. (Ky.), the words were "further or other tax." Exemptions have been strictly construed. 11 Johns. (N. Y.), 77; 8 T. R., 416. The penalty for not paying the 20 cents, shows upon what the tax was

imposed, for it provides that the charter shall cease if the tax is not paid. It was therefore a bonus for the charter.

But suppose that the contract was made as contended for by the other side. By their own showing, it was made with the bank as a person, and the individual stockholders cannot avail themselves of it. If the corporation were to purchase a house, one of the members could not claim an interest in the purchase. They have an interest which is distinct from that of the corporation, because they may sue it, or sue each other. If the contract here be not to tax the bank, it is not equivalent to an agreement not to tax the stockholders. The difference is shown by supposing the tax to be laid before the bank *commenced operations, and laid afterwards. [*142 In the first case it would diminish the capital of the bank, but in the latter it would not. If the individual stockholders can claim the benefit of the exemption, they must also be liable to the state for the payment of the tax which is the price of the exemption. But if Samuel Gordon were sued for the 20 cents stipulated in the act, no one can suppose that he would be bound to pay it. The difference between taxing banks and stockholders is shown in 1 Nott & McC. (S. C.), 527; 4 Wheat., 436; 2 Pet., 459; 2 Bay (S. C.), 654, 672, 683.

Who pays the tax of 1841? If the bank does not, there is no violation of the contract with the bank, and the bank does not, in fact, pay it.

As to *Cheston's case* and the new banks, it has been said that they are on the same footing as the old. The best reply to this is to read the law. The legislature expressly say, that they intend to exempt only the franchises.

Nelson, attorney-general, on same side.

There are two propositions to be examined:

1. The nature of the contract of 1821.

2. Whether the act of 1821 was in force at all in 1841.

1. We admit there was a contract in 1821, and that it is protected by this court. But what is its nature and extent? The original charter of the Union Bank contained no exemption, and, therefore, according to the doctrine in the *Providence Bank* v. *Billings*, the state could tax it. The charter was passed in 1804, and contained no clause imposing a school-tax. But this might have been imposed at any time after the charter, without asking the consent of the bank. The only point upon which the assent of the bank was required, in any subsequent legislation, was that its charter should be continued. It was to expire in 1816. In 1812 an act was passed proposing to extend the charter on certain conditions, but

these were not accepted. In 1813 another act was passed extending the charter to 1st January, 1835, which was accepted.

(Mr. *Nelson* here went into a detailed examination of the several acts.) All the acts show that the legislature had in view the making of the road, and the banks the extension of their charters. The pledge not to incorporate any other banks shows that it was only the franchise which was intended to be protected. The contract was made with the banks as such. They were the contracting party in their corporate capacity. What does the act of 1841 do? It imposes no tax on the capital stock of any bank, but on individual interests. No bank is plaintiff in error here, complaining of a violated contract. The 9th section of the act directs the mode of making the assessment, which was upon the stock in the hands of individuals at its cash value. But this is not the same with its *nominal value, which would have been the guide if the bank had been taxed. As laid, it is nothing more than an income tax, and cannot a legislature lay that without regard to the source from which revenue comes? The distinction between a tax upon a bank, as such, and a tax upon its property, is clearly recognized in the case of *McCulloch* v. *State of Maryland*, where the court say that one may be taxed but not the other. The identity between a bank and its stockholders is shown not to exist, when we consider that the bank, as a corporation, could not become one of its own stockholders. Application had to be made to the legislature for permission for the bank to purchase its own stock. It is true, as said on the other side, that the act of 1821 was accepted by the stockholders in general meeting, but this was a corporate act, and not one proceeding from individual interests. If it had been the latter, whence would the majority have derived the right to bind the minority?

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2. The act of 1834, chap. 274, was accepted by the Union Bank, and by virtue of it the charter was extended to 1859. The acceptance of this new law is a merger of the old, and in the new there is no limitation of the power to tax.

Meredith, for plaintiffs in error, in reply and conclusion.

Let us inquire,

1. What was the nature and character of the contract?

2. Has it been impaired?

Mr. *Meredith* reviewed the charter of the Union Bank and its supplements, and said, that in 1821, some years before the charter was to expire, the legislature was desirous of making a road. It was a fact of universal notoriety that turnpike roads were not profitable. Individuals could not be persuaded

to subscribe and make this one. The cost to the Union Bank was $161,000, nearly ten per cent. upon a capital of $1,800,000. It is conceded that for this the state has relinquished a portion of the power of taxation; but then it is said to be only a partial exemption. We agree that to make out a total exemption, the language must be so strong as to leave no reasonable doubt; and we say it is so. What are the words? "Not to impose any further tax or burden on the banks." There are two important words: "any" and "further." What is the meaning of "any?" In its popular acceptation it would include all kinds of taxes in whatever form they might be laid. According to lexicographers, the word is of unusual and indefinite signification. "Any" tax must mean "every tax," of every nature or description whatsoever. Then, there is the word "further," which refers to something which has been done before and additional. The other side wish to limit the meaning to an addition of the same nature; but no dictionary or example can be found to justify this restriction.

*(Mr. *Meredith* here read from Richardson's Dictionary, title *Further.*) The two words together are as [*144 comprehensive as language could be used. They are quite as strong as those used in 2 Harrison. In the act of 1835, when the legislature intended to put the new banks upon a footing with the old, they say "further or other" in the 3d section. In a preceding section, the words are the same as those in 1821, which shows that they were supposed to be equivalent. The case cited from 11 Johnson was not that of a tax; it was an assessment for opening a street; and the case in 8 T. R., was decided on two grounds: 1. That the property did not belong to the occupier, and 2. That the statute had been repealed. Neither case is in point. In South Carolina, seven out of eight banks are exempted under a clause exempting banks from taxation. The case in Nott & McCord, decided that words of exemption did not extend to the franchise only, but all taxation.

If the words of a statute are plain and definite, it is dangerous to depart, &c. Dwarris on Stat., 3 Law Lib., 48.

If the construction of the other side be given to the act of 1821, the 11th section is of no use; because without it the franchise would have been safe from taxation. In the cases of 12 Mass. and 4 Peters, the right was maintained, it is true, to impose a tax on existing banks, but in neither case was there a relinquishment of the taxing power, express or implied, except from the mere granting of the charter. We may concede the authority of both. But here the banks paid a high

price for their renewed charters, and the legislature could not have taxed the franchise any further. If so, the operation of the 11th section must be extended beyond the franchise.

(Mr. *Meredith* then entered into a critical examination of the acts of 1812 and 1813, and argued that the first act was not accepted, because it did not go as far in protecting the banks as that of 1813; and that the latter would have been rejected if it had not been supposed to exempt them entirely from taxation.)

Mr. Justice WAYNE delivered the opinion of the court.

The question raised in this case by the agreed statement of facts upon the record, is, Does the act of Maryland of 1841, chap. 23, so far as it imposes a tax upon the shares of stock held by stockholders in the Union Bank of Maryland and the other banks mentioned in the statement, impair the obligation of a contract?

The banks are classified in that statement as the old and the new banks. The old are those which were chartered previous to the year 1821; the new, those which were chartered after the year 1830.

Their exemption from the tax imposed by the act of 1841 is claimed under the acts of Maryland of 1821, chap. 131, and that of the 19th March, 1835, chap. 274, called the act of the session of 1834.

*145] *It is admitted that the old banks accepted and have complied with the terms and conditions of the act of 1821; that they also accepted and have complied with the provisions of 1834; and that taxes have always, since the incorporation of the banks, been assessed and levied upon their real and personal property in all the cities and counties of the state, in the same manner as upon property of the same kind belonging to individuals, and that they have always been paid by the banks up to this time.

The question, however, which this court is called upon to decide, and to which our decision will be confined, is, Are the shareholders in the old and the new banks liable to be taxed, under the act of 1841, on account of the stock which they own in the banks?

The statement given by the reporter of the acts of the legislature of Maryland, by which the charters of the banks have been extended at different times, makes it unnecessary to refer to them in detail here.

Are the old banks in Baltimore and their stockholders exempted from further taxation during the continuance of their charters under the act of 1821, chap. 131, by force of the

11th section of that act? Can the old banks, after the year 1845, the time to which their charters were extended by the act of 1821, and the new banks, claim any exemption from taxation under the act of 1834, chap. 274, unless it be a tax upon their franchise of banking?

It appears, from the acts of 1812, 1813, and 1821, that the legislatures which passed them had in view the construction of the Cumberland and Boonsborough turnpike roads, and the establishment of a school fund. That they designed to accomplish those objects by making some of the banks construct the roads, and all of them contributors to the school fund, as the price for their charters. A round sum, or an annual charge, with or without reference to capital stock, may be asked by a legislature for such a franchise. It may be more convenient to the banks to have such a consideration or bonus distributed through the years of their corporate existence, than to pay its equivalent in advance. This option was given to the old banks. Being so given, it is conclusive that the legislature intended the annual tax or charge upon the capital stocks of the banks to be the bonus or price, or part of the price as to some of them, that they were to pay for the prolongation of their franchise of banking. When the banks accepted the acts, by choosing to pay the annual charge instead of the stipulated alternative, it is plain that they thought so too, and that they understood in that way the contract between themselves and the state. Either was a condition, to be accepted and complied with before the charters were to be extended. Such a contract is a limitation upon the taxing power of the legislature making it, and upon succeeding legislatures, to impose any further tax upon the franchise. But why, when bought, as it becomes property, may it not be taxed, as land is taxed which has *been bought from the state, [*146 was repeatedly asked in the course of the argument? The reason is, that every one buys land, subject in his own apprehension to the great law of necessity, that we must contribute from it and all of our property something to maintain the state. But a franchise for banking, when bought, the price is paid for the use of the privilege whilst it lasts, and any tax upon it would substantially be an addition to the price.[1] But whether the bonus for the franchise is paid by an annual tax upon the capital stock, or in any other way, it is in the discretion of the legislature to tax the capital stock as an aggregate, according to its actual value, or the stockholders on account of their

[1] CONSIDERED OBITER. *Minot* v. *Philadelphia, &c., R. R. Co.*, 2 Abb. (U. S.), 337.

separate ownership of it, or the dividends in the aggregate, or the stockholders on account of their portions of them. The limitation and the power to tax, as both have been just expressed, was substantially conceded by counsel on both sides of this cause. We did not understand the counsel for the appellants as contending, that the shareholders in the old banks were exempted from the tax imposed upon them on account of their stock, except by the force of the 11th section of the act of 1821. Their argument was, though the franchise might be taxed separate from the stock of a bank, whether the annual tax paid by the banks upon their capital stock was a tax upon their franchises or not, that the banks were exempted from further taxation; the old banks by force of the 11th section of the statute of 1821, and all of the banks in Baltimore by force of the act of 1834. The argument of the counsel for the defendant in error was, that the annual tax paid by the banks was a tax upon their franchises, and that the 11th section did not give to the stockholders any exemption from being taxed as persons on account of their stock. Whether or not the exemption given by that section is extended to the old and the new banks in virtue of the act of 1834, is another question, to which a separate answer must be given in the course of this opinion.

Has such an exemption been given to the old banks? The language of the 11th section of the act of 1821 is: "And be it enacted, That, upon any of the aforesaid banks accepting and complying with the terms and conditions of this act, the faith of the state is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act." This is the language of grave deliberation, pledging the faith of the state for some purpose—some effectual purpose. Was that purpose the protection of the banks from what that legislature and succeeding legislatures could not do, if the banks accepted the act, or from what they might do, in the exercise of the taxing power? The terms and conditions of the act were, that the banks should construct the road and pay annually a designated charge upon their capital stocks, as the price for the prolongation of their franchise of banking. The power of the state to lay any further tax upon the franchise was exhausted. That is the contract between the state and the banks. It follows, *147] then, *as a matter of course, when the legislature go out of the contract, proposing to pledge its faith, if the banks shall accept the act, not to impose any further tax or burden upon them, that it must have meant by those words an exemption from some other tax than a further tax upon the franchise

of the banks. The latter was already provided against. To confine the pledge to any further tax upon the franchise, surrenders the whole clause as a substantive enactment, to a supposed needless declaration of the legislature, that it would not do what it had stipulated by its contract not to do. The faith of states is never pledged but for some substantial end, within the competency of their legislative power; and it is not for us to suppose that of Maryland was given in the act of 1821, with a less grave intent. "Not to impose any further tax or burden," when used in reference to some tax already imposed, means no other tax besides that to which reference is made. Those words, so used, cannot be limited by a refinement upon the etymology of the word "any," out of or beyond its meaning in common discourse, to any like; and the words "any further tax," used with relation to some other tax, will, by common consent, as it always has been, be intended to mean any additional tax besides that referred to, and not any further like tax.

Having determined that the clause in question was not meant as a pledge against further taxation upon the franchises of the banks, but that it was a pledge against additional taxation, what is the extent of exemption given by it, or to what does it apply? Does it exempt the respective capital stocks of the banks, as an aggregate, and the stockholders from being taxed as persons on account of their stock? We think it does both. The aggregate could not be taxed, without its having the same effect upon the parts, that a tax upon the parts, would have upon the whole. Besides, the legislature, in proposing the terms and conditions of the act, use the word "banks" with reference to the consent or acceptance of the act being given by the stockholders, according to a fundamental article of their charters. The acceptance of the act could only be made by the stockholders. They did accept, and the state recognised it as the act of the stockholders. It could not have been given or been recognised in any other way. True it is, when accepted and recognised, it became a contract with the banks. But its becoming a contract with the banks determines of itself nothing. We must look in what character, or by whose assent it was to become a contract with the state, to ascertain the intention of the legislature in making the pledge, "that upon any of the aforesaid banks accepting of and complying with the terms and conditions of this act, the faith of the state is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act."

The senses in which the words bank or banks are used,

occur every day in conversation, and are understood by every one. But *the sense in which they are intended to be used, is determined by their connection with what is said besides. When we speak of an act to be done by a bank or banks, we mean an act to be done by those who have the authority to do it. If it be an act within the franchise for banking, or the ordinary power of the bank to contract, and it is done by the president and directors, or by their agent, we say the bank did it, and every one understands what is meant. If, however, an act is to be done relative to the institution, by which its charter is to be in any way changed, the stockholders must do it, unless another mode to effect it has been provided by the charter. In one sense, but after it has been done, we may say the bank did it, but only so because what the stockholders have done, became a part of the institution, which it was not before. The act to be done in this instance was relative to the institution. The legislature knew it could only be done by the stockholders, and it uses the word banks in reference to the act being accepted by the stockholders. The act was accepted by them. When, then, the legislature says, "that upon any of the aforesaid banks accepting of and complying with the terms and conditions of this act, the faith of the state is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act," the relative is as broad as the antecedent, comprehending all that the latter referred to. It cannot be said, then, that the stockholders in the old banks are not exempted by the 11th section of the act of 1821 from being taxed as persons, on account of their stock in those banks, during the continuance of their charters under that act.

Such was manifestly the intention of the legislatures which passed the acts of 1818 and 1821, from their language. It is confirmed by the attendant circumstances. Each of those legislatures were anxious to have a certain road constructed, which they thought the convenience and intercourse of the citizens of Maryland required; and they were also anxious to raise an adequate school fund for every county in the state. They determined that both should be accomplished by incorporating certain banks, with the obligation upon them to make the roads, and to make all the banks in the state pay an annual tax upon their respective capitals, for a school fund, as the conditions upon which their charters were to be extended. By the act of 1813, chap. 122, every incorporated bank in the state was required to pay the annual tax of

twenty cents upon every hundred dollars of its capital stock, as the condition upon which its charter was to be extended.

When the legislature, in 1821, incorporated the Boonsborough Turnpike Company, and proposed to extend the charters of those banks which, by the terms of the act, were to subscribe for stock enough to complete the road, it renewed upon those banks the school tax which had been imposed upon them in common with the *other [*149 banks, by the act of 1813. The 11th sections in both acts are identical. In what spirit were those acts offered to the acceptance of the banks? In what spirit was it that the banks viewed and accepted these acts? It was an unusual way of providing means for the construction of turnpike roads. The tolls might turn out to be enough to compensate them for the expenditures. They might not. Though the legislature thought the construction of the roads and paying the school-fund tax were no more than an adequate price for an extended franchise, it is very certain that the stockholders may have thought, that the incorporation of the banks into turnpike companies, with an obligation upon them to withdraw so much money from their business operations as was sufficient to finish the roads, presented only a contingent possibility that they could be remunerated by tolls from the roads. When the act of 1821 was proposed, they had some experience of what had been the result of the construction of the Cumberland road. Is it not possible, then, that when the acts of 1813 and 1821 were in preparation, or as they were being enacted, that the 11th section was introduced as an inducement to the stockholders to accept those acts? Whether the tolls from the road have ever compensated the banks for the expenditure upon them, does not appear in the case. But it was natural that the stockholders, knowing as they did that a tax upon the franchises of the banks would not exempt them from other taxation, stipulated in both instances that a provision should be introduced into the acts surrendering the state's right to tax them further than they were about to be by those acts. In whatever way we examine the acts of 1813 and 1821, we are of opinion that it appears from the 11th sections in those acts, to have been the intention of the legislatures which passed them, to exempt the stockholders from taxation as persons on account of the stock which they owned in the banks. This exemption, however, is limited to the old banks in Baltimore which were chartered before 1821, during the continuance of their charter under the act of 1821. It is founded upon the 11th section of that act, and it is our opinion that the act of 1841, chap. 23, in so far as it imposes a tax upon the stock-

holders in those banks, on account of their stock, does impair the obligations of a contract, and is void by the 10th section of the 1st article of the Constitution of the United States.

The act of 1834 does not extend to the old or the new banks an exemption from the tax imposed by the act of 1841, chap. 23. It is an act to extend the charters of the several banks in Baltimore. The second section prescribes the terms upon which the franchise for banking is extended. Those terms are the payment annually of twenty per cent. upon every hundred dollars of the respective capitals of the banks, and their proportional parts of $75,000, in two yearly instalments, com-
*150] puted from the passage of the act, according to the combined rates of their respective capitals paid in, *and of the time for which their charters are respectively continued beyond the first day of January, 1845.

Upon a failure of any bank to pay either the annual charge or its proportional instalment, its charter is declared null and void. The annual charge and the instalment make the bonus to be paid by each bank for its continued franchise. It was urged for the old and the new banks, that the annual tax which they were required to pay by the second section of the act of 1834 being upon their respective capitals, a tax upon the stockholders on account of their stock would be equivalent to an increase of the price which had been given for the franchise. The effect upon the stockholders would be the same, as they pay both, but that is because they agreed to pay an annual tax upon the capital stock, for their franchise, without any stipulation by the state that were not to be taxed as stockholders, on account of their stock, as was the case in the eleventh section of the act of 1821. The franchise is their corporate property, which, like any other property, would be taxable, if a price had not been paid for it, which the legislature accepted, as the consideration for allowing them to use the franchise during the continuance of their charters. The capital stock is another property—corporately associated, for the purpose of banking—but in its parts is the individual property of the stockholders in the proportions they may own them. Being their individual property, they may be taxed for it, as they may for any other property they may own. This is not only the case in Maryland. A franchise for banking is in every state of the union recognized as property. The banking capital attached to the franchise is another property, owned in its parts by persons, corporate or natural, for which they are liable to be taxed, as they are for all other property, for the support of government.

We are of opinion that the stockholders in the old banks

are exempt from the tax imposed by the act of 1841, chapter 23, during the continuance of their charters under the act of 1821, but that the stockholders in the old and new banks are liable to be taxed by the act of 1841, or that they can claim no exemption under the act of 1834, by which their charters were further extended.

The judgment of the Court of Appeals is therefore reversed, and the cause will be remanded, with directions to enter up a judgment for the plaintiff in error.

* WILLIAM SEARIGHT, COMMISSIONER AND SUPERINTENDENT OF THE CUMBERLAND ROAD, WITHIN THE STATE OF PENNSYLVANIA, PLAINTIFF IN ERROR, *v.* WILLIAM B. STOKES AND LUCIUS W. STOCKTON, WHO HAVE SURVIVED RICHARD C. STOCKTON, DEFENDANTS IN ERROR. [*151

Under the acts of Congress ceding to Pennsylvania that part of the Cumberland road which is within that state, and the acts of Pennsylvania accepting the surrender, a carriage, whenever it is carrying the mail, must be held to be laden with the property of the United States, within the true meaning of the compact, and consequently exempted from the payment of tolls.[1]

But this exemption does not apply to any other property conveyed in the same vehicle, nor to any person travelling in it, unless he is in the service of the United States and passing along in pursuance of orders from the proper authority.

Nor can the United States claim an exemption for more carriages than are necessary for the safe, speedy, and convenient conveyance of the mail.[2]

THIS case was brought up by writ of error from the Circuit Court of the United States for the western district of Pennsylvania, and involved the right of the plaintiff in error, acting under the authority of the state of Pennsylvania, to collect tolls from the stage-coaches which carried the mail of the United States.

The circumstances under which the question arose were these:

On the 30th of April, 1802, and 3d of March, 1803, acts of Congress were passed, the effect of both of which taken together was, that three per cent. of the amount received for

[1] In *Hopkins* v. *Stockton*, 2 Watts & S. (Pa.), it was decided that a toll-gate keeper upon that part of the National Road which passes through Pennsylvania, would not be justified by the act of the 18th of June, 1836, in stopping a coach carrying the United States mail, for the refusal to pay toll.

[2] COMPARE, *Neil* v. *Ohio*, *post*, *720, 742, 745; *Achison* v. *Huddleston*, 12 How., 293.

the sales of public land in Ohio, should be expended in making roads within the said state, and two per cent. of said fund be also expended in making public roads leading from the navigable waters emptying into the Atlantic to the Ohio river, upon certain conditions, which were accepted by Ohio.

On the 29th of March, 1806, Congress passed an act to provide for laying out the road by commissioners, and directed the President to pursue such measures as in his opinion should be proper to obtain the consent for making the road, of the state or states through which the same may have been laid out; the expense of the road to be charged to the two per cent. fund.

Pennsylvania, Virginia, and Maryland all gave their assent. Pennsylvania passed her law on the 9th of April, 1807, and gave power to those who were to make the road to enter upon land, dig, cut, and carry away materials, &c. The road was laid out from Cumberland, in Maryland, to Wheeling, on the Ohio river, and made; but a great difficulty having arisen, on the part of the United States, in keeping it in repair, the road fell into decay, and a new system of legislation was adopted to attain this object.

On the 4th of February, 1831, the state of Ohio passed a law for the preservation and repair of the United States road. It provided, that whenever the consent of Congress should be *152] obtained, the governor of the state should take the road under his care, erect gates *and toll-houses, appoint a superintendent, collectors of tolls, &c., with this proviso amongst others: "Provided, also, That no toll shall be received or collected for the passage of any stage or coach conveying the United States mail, or horses bearing the same, or any wagon or carriage laden with the property of the United States, or any cavalry or other troops, arms, or military stores belonging to the same, or to any of the states comprising this union, or any person or persons on duty in the military service of the United States or of the militia of any of the states."

The law contained the necessary provisions for the preservation of good order upon the road, and also a stipulation that the tolls should be neither below nor above a sum necessary to defray the expenses incident to the preservation and repair of the same.

On the 2d of March, 1831, Congress assented to this act.

On the 4th of April, 1831, Pennsylvania passed an act "for the preservation and repair of the Cumberland road." It provided for the appointment of commissioners, who were directed to build toll-houses and erect toll-gates, to collect tolls, with the following exceptions: "And provided, also,

That nothing in this act shall be construed so as to authorize any tolls to be received or collected from any person or persons passing or repassing from one part of his farm to another, or to or from a mill, or to or from any place of public worship, funeral, militia training, elections, or from any student or child going to or from any school or seminary of learning, or from persons and witnesses going to and returning from courts: and provided, further, that no toll shall be received or collected for the passage of any wagon or carriage laden with the property of the United States, or any cannon or military stores belonging to the United States or to any of the states composing this union."

The 4th section directed the amount of tolls, after deducting expenses, to be applied to the repairs and preservation of the road, and gave the commissioners power to increase or diminish the rates of tolls, provided that they should at no time be increased beyond the rates of toll established by an act incorporating a company to make a road from Harrisburg to Pittsburg, passed in 1806. The toll fixed by this act upon a coach and four horses was twenty cents for every five miles.

The 10th section was as follows: "And be it enacted, &c., That this act shall not have any force or effect until the Congress of the United States shall assent to the same, and until so much of the said road as passes through the state of Pennsylvania be first put in a good state of repair, and an appropriation made by Congress for erecting toll-houses and toll-gates thereon, to be expended under the authority of the commissioners appointed by this act: Provided, the legislature of this state may, at any future session thereof, change, alter, or amend this act, provided that the same shall not be so altered or amended as to reduce or increase the rates of toll hereby *established below or above a sum necessary to defray the expenses incident to the preservation and repair of said road, for the payment of the fees or salaries of the commissioners, the collectors of tolls, and other agents. And provided, further, that no change, alteration, or amendment shall ever be adopted, that will in any wise defeat or affect the true intent and meaning of this act." [*153

On the 23d of January, 1832, Maryland passed an act, which, in its essential provisions, was the same with that of Pennsylvania; and on the 7th of February, 1832, Virginia passed a similar law.

On the 3d of July, 1832, Congress declared its assent to the above mentioned laws of Pennsylvania and Maryland in these words, "to which acts the assent of the United States is hereby given, to remain in force during the pleasure of Con-

gress," and appropriated $150,000 to carry into effect the provisions of said acts; and on the 2d of March, 1833, assented to the act of Virginia, with a similar limitation.

On the 24th of June, 1834, Congress passed an act for the continuation and repair of the Cumberland road, appropriating $300,000 to that object.

The 4th section was as follows: "And be it further enacted, That as soon as the sum by this act appropriated, or so much thereof as is necessary, shall be expended in the repair of said road, agreeably to the provisions of this act, the same shall be surrendered to the states respectively through which said road passes; and the United States shall not thereafter be subject to any expense for repairing said road."

On the 1st of April, 1835, Pennsylvania passed a supplement to the act above mentioned, accepting the surrender by the United States, &c., &c.

On the 13th of June, 1836, Pennsylvania passed another act "relating to the tolls on that part of the Cumberland road which passes through Pennsylvania, and for other purposes," the 1st section of which was as follows: "That all wagons, carriages, or other modes of conveyance, passing upon that part of the Cumberland road which passes through Pennsylvania, carrying goods, cannon, or military stores belonging to the United States, or to any individual state of the union, which are excepted from the payment of toll by the 2d section of an act passed the fourth of April, anno Domini eighteen hundred and thirty-one, shall extend only so far as to relieve such wagons, carriages, and other modes of conveyance from the payment of toll to the proportional amount of such goods so carried belonging to the United States or to any of the individual states of the union; and that in all cases of wagons, carriages, stages, or other modes of conveyance, carrying the United States' mail, with passengers or goods, such wagon, stage, or other mode of conveyance, shall pay half toll upon such modes of conveyance."

*154] On the 5th of April, 1843, another act was passed by Pennsylvania, *the 39th section of which was as follows: "That from and after the passage of this act, the commissioner of the Cumberland road shall have power to increase the rate of tolls on all stage-coaches drawn by four or more horses, to any sum not exceeding one dollar, at each gate upon said road within the state of Pennsylvania; and the said commissioner shall have the same power to enforce the payment and collection of tolls authorized by the act of thirteenth of June, eighteen hundred and thirty-six, relating to tolls on that part of the Cumberland road passing through

Pennsylvania, by stopping such coach or coaches, as is provided by the act of fourth of April, eighteen hundred and thirty-one, for the preservation and repair of the Cumberland road; and to exercise all the means and remedies authorized by said acts for the collection of tolls and prevention of fraud on said road; reserving also to the said commissioner the right to sue or maintain any action therefor, as he might or could do at common law, in addition to the remedies herein provided."

A suit was brought on the 29th November, 1842, in the Circuit Court of the United States for the western district of Pennsylvania, by agreement of parties, and a statement of facts, signed by the respective counsel, in the nature of a special verdict, as follows:

"It is agreed that this case be submitted to the court on the following statement of facts, as if found by a jury.

"The plaintiff is the commissioner and superintendent of so much of the Cumberland or National road as lies within the state of Pennsylvania, duly appointed under and by virtue of the laws of that state in such case provided, and is a citizen of said state. The defendants and Richard C. Stockton, whom they have survived, are and were citizens of Maryland. The defendants, together with the said Richard, whom they have survived, were joint partners in certain contracts for carrying the mail of the United States hereunto annexed. The route described in said contracts extended over so much of the road called the Cumberland or National road as lies within the commonwealth of Pennsylvania. Said contracts were duly executed between the postmaster-general of the United States thereto lawfully authorized by the laws of the United States, and said contractors in conformity with law. The mail of the United States was transported by said contractors in accordance with the provisions of said contracts, during the time therein stipulated, in carriages constructed in conformity with the directions and requirements of the postmaster-general; said carriages were constructed and accommodated as well for the transportation of the mail, as for carrying passengers and their baggage, but the number of said passengers was limited so as not to interfere with or impede the transportation of the mail, and in no case was any passenger carried when the transportation of the mail would be thereby retarded or interfered with. The said National road within the territorial limits *of Pennsylvania was, so far and to such extent [*155 as the Constitution and laws of the United States, and the state of Pennsylvania, vested the same, the property of the United States, and had been constructed under the authority of said laws by the United States. The Constitution and

laws of the United States, and of the commonwealth of Pennsylvania, bearing upon this subject, and the executive proceedings of the same respectively, are to be deemed and considered part of this agreed case. No tolls were paid by said contractors for or upon any vehicle or carriages employed or used by them for the transportation of said mail during the period of the existence of said contracts, notwithstanding said carriages ordinarily as aforesaid carried passengers, and said contractors received the passage money therefor for their own use.

"Under the laws of the United States and of the state of Pennsylvania, so much of said Cumberland or National road as lies within the limits of the state of Pennsylvania, was ceded by the United States, and accepted by Pennsylvania, upon the terms and conditions expressed and contained in said statutes. Since the year 1835, the state of Pennsylvania has held said road under and by virtue of said laws, and has performed the terms and conditions therein prescribed in every respect, unless the imposition and claim of tolls as herein stated is so far an infraction of the compact created by said laws. Payment of tolls imposed by and under the laws of Pennsylvania, has been demanded of said contractors by the plaintiff and his predecessors in office, for and on account of their carriages so as aforesaid employed in the transportation of the mail with passengers so carried as aforesaid; such payment of tolls has been resisted and refused by said contractors on the ground that the carriages employed in the transportation of the mail of the United States, on said road, were not under the said compact and laws legally liable to the payment of said tolls.

"The said carriages employed in the transportation of the mail were four-wheel carriages drawn by four horses each, and they ran over said route and through the six gates which are upon said road within the said state of Pennsylvania, twice daily, being their eastern and western routes. The full rates of toll established by law upon said road in Pennsylvania, for a daily line of four-horse post coaches or stages, were, at each of the said six gates, including the eastern and western routes, daily

From 1 January, 1836, to 1 April, 1837, . . 40 cents.
April, 1837, to 1839, . . 60 cents.
After 1839, to present time, . . . 100 cents.

"If, upon the foregoing state of facts, the court shall be of opinion that the defendants are liable to pay tolls for their carriages so employed in the transportation of the mail of the United States, judgment to be entered for the plaintiff for the sum of $6,000. If it shall be of opinion that the said carriages

so employed are not subject *to the payment of said tolls, then judgment to be entered for the defendants.

R. P. FLENNIKEN, *for Plaintiffs.*
RICH'D. S. COX, *for Defendants.*"

Upon this statement of facts the court below directed judgment to be entered in favor of the defendant, and to review this decision of the court the writ of error was brought.

Veech and *Walker*, for the plaintiffs in error.
Coxe and *Nelson*, attorney-general, for the defendants in error.

(This case was argued at the preceding term of the court by *Flenniken* and *Walker*, for the plaintiffs in error, and *Coxe*, for defendants, but the court ordered a re-argument at the present term.

Veech, for plaintiffs in error,

After reciting the history of the road, said, that if the road was the property of the United States, it might be considered a hardship that the mail could not pass free. But Pennsylvania had only granted the right of way. She was the last of the three states who argued that it should be made, and then stipulated that it should pass certain points.

The United States had no jurisdiction over the soil, and no more power over it than state officers had when they were making state roads. No one thought of making any provision for keeping the road in repair. As soon as ten miles were made, a difficulty arose upon this point. 1 Collection of Surveys, &c., published in 1839, by order of the Senate. Report of Shriver, communicated to Congress by Mr. Gallatin.

Mr. Gallatin said, that "tolls were suggested, but that could only be done by authority of the state." Same book, 133, 639.

Mr. Dallas, when Secretary of the Treasury, made a report on the subject, in which he said that provision ought to be made for keeping the road in repair, but that Congress, of itself, had no power in the premises. Doc. No. 59, page 658.

The road continued to decay until 1822, when a bill was passed to erect gates and collect tolls, which was vetoed by the President of the United States. Congress then appropriated a small sum for repairs. Mr. Buchanan moved an amendment, providing for a cession of the road to the states through which it passed, on condition that they would collect tolls and keep it in repair. There was no reservation in favor of the mail.

In 1823 the same amendment was offered, without any reservation.

Between 1828 and 1832, the road became so much out of repair that another movement was made. (The counsel here referred to the several acts which were passed by state legislatures and by Congress.)

*157] *In the mean time, Pennsylvania had constructed roads leading from Philadelphia to Pittsburg, and the question was, whether she should turn the travel off her own roads to one which passed through only a small portion of the state. The Pennsylvania legislature struck out a part of the Ohio bill, which they had before them. When the Ohio bill was before Congress, Mr. Burnet, a senator from that state, said, that care was taken that the mail of the United States should pass free. 7 Reg. Deb., 287.

There are other differences between the laws of Pennsylvania and Ohio. The Virginia law is almost a copy of that of Ohio, although, in the spirit of old-fashioned Virginia hospitality, one who is visiting his neighbor is not allowed to be charged with any toll. Maryland copies the law of Pennsylvania. Maryland and Pennsylvania said, that the United States should first put the road in repair and erect toll-houses, whilst Virginia imposed no such restriction. The cost to Congress was about $750,000 in repairing the road and erecting gates. Before this time, the mail was carried in one line of coaches. The contract with the defendants for carrying it in 1835 was to pay them $9,708. In 1837, they were paid $27,600.

Under the present law, half toll is charged upon the coaches which carry the mail and passengers; if there is nothing but the mail they go free. Suppose we admit, that the mail is the property of the United States, can a coach be said to be "laden with the property of the United States" when it has nine passengers in it and only a small mail bag? Or, could this be affirmed of a wagon laden with flour and one musket? Such a construction forces words from their true import. But the mail cannot be properly called the property of the United States. All carriers have a special property in their load to protect it from depredations. But what the law means is, that the United States must have an unqualified right of property in the subject matter. It will be necessary for the other side to make out two propositions:

1. That the mail is the property of the United States.

2. That a vehicle can be said to be laden with the mail when it has a single bag in it.

Coxe, for defendants in error.

(Mr. *Coxe* traced the history of the road as it is found in the laws and in 1 State Papers, tit. *Miscellaneous*, 432, 474, 714, 718, 940, 947.)

The error of the argument on the other side is in supposing that Ohio was the only party interested in the original construction of the road. The United States was a large landed proprietor, and wished to open an easy access to the lands in the west, in order that sales might be increased. Pennsylvania, it is true, did not cede the land over which the road passed, but she was deeply interested in the general result. The [*158 United States did not claim sovereign power *over it. Still they have some interest in it, and we do not claim more than all incorporated companies have over the roads which they make. The Pennsylvania act is different from that of Ohio. But the reason is, that the road was completed in the former state and not in the latter. (Mr. *Coxe* here reviewed the particular provisions of the several acts.) Is there any ground to suppose, that Congress intended to make a different contract with different states? The conditions are essentially the same: one exempts the property of the United States, and the other, the mail. The act of Pennsylvania speaks of "vehicles carrying the United States mail," thus recognizing the mail as belonging to the government. The mail is one of the most valuable branches of the government, connecting itself closely with the business of the people, and a proportion of the mail matter is absolutely the property of the government, being communications from one public officer to another. The mail is fenced round with protection, by law, from robbery and depredation, and the bags and locks are public property. The act of congress of 1831, throughout, recognizes the mail as being the property of the government. Unless passengers were to go in the coaches, there would have to be a guard; but they are the best guard. The contracts require, that stages shall be suitable for passengers. The right of altering the contract is always reserved to the government, and although there may be three lines now instead of one formerly, yet the letter of the postmaster-general to the governor of Pennsylvania shows, that the mail could not now be carried in one coach. If there can be a toll imposed upon carriages when there are passengers, why not also when there are no passengers? and such an amount may be taxed as will prevent the running of the mail. A question of power cannot be decided by the greater or lesser exercise of it: 4 Wheat. 327, 351, 387, 417, 426, 429.

Nelson, attorney-general, on the same side.

The question lies in a narrow compass. It is, whether there is a contract between the United States on the one hand and Pennsylvania on the other; and if so, what is its nature? The act of 4th April, 1831, is the foundation of the compact. It proposed to provide for the repair of the road. Commissioners were appointed on condition that the United States would repair the road and erect gates. The act was to have no force until Congress assented to it, and appropriated money for toll-houses and gates. Here is a proposal, an offer for a contract The 10th section says, that it shall not go into operation until an appropriation is made, but there is nothing said about ceding jurisdiction. Congress, in 1832, assented, on condition that Pennsylvania would execute her part of the contract and keep the road in repair. The power of Congress over internal improvements is not drawn into the case at all. The United
*159] States have a right to purchase the privilege of transporting the mail over *any road. If Pennsylvania had said, give us $750,000, and your mail shall pass free, would not such a contract have been within the competency of the parties to make, and have been good? The consideration was a valuable one to Pennsylvania. She cannot now deny the right of the United States to make the road, because she accepted the cession, and actually holds title under the United States. 9 Laws U. S., 232, 233, act of surrender by United States.

There was a power reserved to Pennsylvania to change the regulations of the road, provided the compact was not infringed. But the act of 1836 asserts the authority of the legislature to vary the original terms, and levies half tolls. It cannot be said by the other side, that the two acts do not clash with each other, because the legislature says they do. That the mail is property is too plain to be argued.

What were the circumstances under which the acts were passed? The road had been in use for twelve or fourteen years before 1831. The mail was carried in stages, without paying any toll, in the same description of vehicle as that now taxed. There never was any other species of property of the United States carried on it; at least, the record does not show that there was. Was it a lure, then, to the government to spend $800,000 for the privilege of passing property free which it had never transported on the road, and was not likely to transport?

It has been said, that because Ohio was more specific in her legislation, therefore Pennsylvania did not mean to exempt the mail. But of what authority is the act of another state? The object was the same with them all.

We have the opinion of the executive and judicial departments of Pennsylvania, 2 Watts & S. (Pa.), 163.

But suppose there was no compact. The act of 1836 would still have been invalid. It is not a general law to collect tolls, but directed specifically against the mail. The property of the contractors is, no doubt, subject to taxation by a state; but a law levelled exclusively against the mail is a different thing. A power to destroy the means implies a power to destroy the thing itself. The case of *McCulloch* v. *Maryland*, 4 Wheat., was an attempt to tax the means by which the bank carried on its operations. In *Weston* v. *City of Charleston*, 2 Pet., 449, the same principle was established. It was held that loans were means to execute the powers of Congress, and to tax the stock would impair the means. So, 15 Pet., 435, 448. It has been said, that if these tolls are not collected the road will go out of repair. But can this be so? The whole amount charged is only $1200 a year, upon a road on which $800,000 were expended as late as 1835, built at the request of Pennsylvania, and which she pledged her faith to keep in repair. It has been said also that the privilege of passing free may be abused; that one hundred stages may be run upon the road. But the record presents no such case. *The stages are used *bona fide* by the contractors under their contract with the postmaster-general. [*160

Walker, for plaintiffs in error, in reply and conclusion.

If the court shall be against us on the interpretation of the compact, we shall have to invite their attention to the following grave questions:

1. That the federal government has no power, under the Constitution, to construct a road within the limits of a state.

2. That the consent of a single state cannot enlarge the powers of the federal government, even within its own limits, and much less within the limits of another state.

3. That the two per cent. fund referred to in the several acts of appropriation, was exhausted before the road reached the Pennsylvania line.

4. That the consent of Pennsylvania, under the law of 9th of April, 1807, was based upon the appropriation of the two per cent. fund, and that alone, to the construction of said road within her limits.

5. That Congress possessed no power, under the Constitution, to collect toll upon said road in the state of Pennsylvania.

6. That the state of Pennsylvania had jurisdiction of said road, and the right to collect toll, and possessed this power as

one of the rights not delegated in forming the Constitution of the union, and which could only be relinquished by an amendment of the Constitution.

7. That the right to collect toll in this case was never surrendered by the state of Pennsylvania.

The power of the federal government to construct roads has been abandoned for eight years past. The authority to establish post-roads, is merely to designate the road from point to point; and if the United States have no constitutional power, an act of one of the states cannot confer it. If there was no power to make the road, there was none to repair it or collect tolls; and an agreement to repair it was null and void, as being repugnant to the Constitution. The jurisdiction which Pennsylvania had, originally, over the soil of the road, was never surrendered; and if it had been, her legislature had no power to surrender it.

The speech of Mr. Burnet gives the history of this matter. The road was going to ruin, and Congress refused to appropriate. The friends of the road in Ohio obtained the passage of an act there. It was a favorite in that state, but not in Pennsylvania. The latter state had commenced a large system of improvement from Philadelphia to Pittsburg, and knew that this Cumberland road would draw off the travel from her own works. The law of Pennsylvania was, therefore, dissimilar from that of Ohio. Ohio did not require the road to be put in repair before accepting the cession, but Pennsylvania did.

*161] There are many other important differences between the *two laws. Congress hastened to accept the Ohio law before Pennsylvania acted. What reason is there to think that Pennsylvania intended to imitate Ohio? There is none. If so, why was the phraseology changed? Some words must have been intentionally omitted, and yet this court is now asked to insert them, to change places with the legislature at Harrisburg, and do what it refused to do. Although, in general, the mail may be property, can it be considered so here, where there is a special exclusion? Every word of a statute must receive a meaning, unless the court are compelled to consider some words synonymous. In the Ohio law, the words "mail" and "property" are not synonymous: it exempts a "stage or coach carrying the mail," and a "wagon or carriage, carrying property of the United States;" referring to different vehicles, carrying different things. The "mail" is never carried in wagons. The government recently brought a large copper rock from Lake Superior. This could not have passed free unless under the head of property. Ohio had, therefore, two distinct provisions in her law; Pennsylvania only adopted

one of them. The toll on "stages" included the coach carrying the mail, in words and letters. The Ohio law asked her to exempt the mail, but she refused.

But does "property" include the mail? Does a department, when making a schedule of its property, include the contents of the mail? The United States is only a common carrier, and paid as such. If not, then postage is exacted for carrying the property of the United States. It is the property of the persons interested; they can recover it at law. It has been said that because a common carrier has a special property in what he carries, therefore the United States have a property in the mail. But this technical principle was unknown to the farmers and mechanics who passed the act of 1831. Again, what is the meaning of "laden?" it is the bulk of the load. If an officer of the United States puts a single box in a wagon, and the rest of the load is private property, could it be said, with any propriety that the wagon was "laden" with the property of the government? To justify this, other words must be interpolated into the law, viz., "in whole or in part." But they are not there. If "property" means the "mail," then the section must read, "laden with the mail;" and if this be so, a single mail-bag will not exempt the coach from tolls. If the contractors had a steam-wagon conveying 100 passengers and a small mail-bag, would they all go free? It is said that we attack the mail, but we do not. The government pays turnpike gates everywhere else. When companies make roads with their own money, they allow the government to use them on the same terms with every one else. If it can seize upon roads, the postmaster-general would soon get rid of all difficulties with railroad companies. But we deny the right.

But upon whom does the tax fall in this case? The record says that stages conveying nothing but the mail pass free. It is then *the passengers who pay the tax. The [*162
contractors must increase the fare. The government is not a party upon the record, and the postmaster-general has no business to come here by counsel. The whole difficulty has arisen from an effort of contractors to draw custom to their own line from roads where tolls are charged. All opposition stages, too, must be broken down on this road, because those stages will be charged with toll.

It is said that passengers are a guard to the mail. They do not consider themselves as paying their passage money for the privilege of guarding the mail. But, upon this theory, the contractors ought to be bound to carry some always; whereas the stages frequently run without any passengers.

Pennsylvania has been charged with violating her faith. But how can this be? She derives no revenue from the road; the whole of the tolls are expended upon repairs, and that too in a case where her own pecuniary interests suffer, because the travel is drawn away from her own roads. The true interest of the United States is to maintain our view of the case; because, if tolls enough are not collected to keep the road in repair, it must go to ruin, and then the contractors will charge a higher price for carrying the mail, even at a slower pace.

The act of 1836 is only declaratory of that of 1831, and not inconsistent with it. The latter exempts wagons when laden with the property of the United States in the whole; and the former proportions the exemption to the amount of property thus owned. The imposition of half-toll is, in fact, a privilege granted. The whole of the Pennsylvania legislation is one continued series, instead of being separate and inconsistent acts. The law of 1831 accepted the road, when it should be put in repair and toll-houses erected. The act of Congress, making the appropriation, did not pass till 1834; and in April, 1835, Pennsylvania accepted the surrender, and appointed commissioners. Between that time and the first of January, 1836, gates were erected, and the act of 1836, now under consideration, was passed without any loss of time. The case in Watts & Sergeant has been referred to, but here is a certified copy of the record, showing that, from 1836 to 1839, bills were made out quarterly. Before the act of 1836, all the stages, except the fast line, paid tolls. These were therefore collected under the act of 1831. There were only two lines, and the commissioners agreed to excuse one, on condition that the other paid. This was half-toll, and was the foundation of the law.

Mr. Chief Justice TANEY delivered the opinion of the court.

The question in this case is, whether the state of Pennsylvania can lawfully impose a toll on carriages employed in transporting the mail of the United States over that part of the Cumberland road which passes through the territory of that state?

*163] *The dispute has arisen from an act of the legislature of Pennsylvania, passed in 1836, whereby wagons, carriages, stages, and other modes of conveyance, carrying the United States mail, with passengers or the goods of other persons, are charged with half the toll levied upon other vehicles of the like description. The plaintiff in error is the commissioner and superintendent of the road, appointed by the

state. The defendants are contractors for carrying the mail, and they insist that their carriages, when engaged in this service, are entitled to pass along the road free from toll, although they are conveying passengers and their baggage at the same time. In order to obtain the opinion of this court upon the subject, an amicable action was instituted by the plaintiff in the Circuit Court of the United States for the western district of Pennsylvania, for the tolls directed to be collected by the law above mentioned, and the facts in the case stated by consent. The judgment of the Circuit Court was against the plaintiff, and it is now brought here for revision by writ of error.

The Cumberland road has been so often the subject of public discussion, and the circumstances under which it was constructed and afterwards surrendered to the several states through which it passes, are so generally known, that we shall forbear to state them further than may be necessary for the purpose of showing the character of the present controversy, and explaining the principles upon which the opinion of this court is founded.

The road in question is the principal line of communication between the seat of government and the great valley of the Mississippi. It passes through Maryland, Pennsylvania, Virginia, and Ohio, and was constructed at an immense expense by the United States, under the authority of different and successive acts of Congress: the states contributing nothing either to the making of the road or to the purchase of land over which it passes. They did nothing more than enact laws authorizing the United States to construct the road within their respective limits, and to obtain the land necessary for that purpose from the individual proprietors upon the payment of its value.

After the road had thus been made—although it was constructed with the utmost care, sparing no efforts to make it durable—it was still found to be incapable of withstanding the wear and tear produced by the number of carriages continually passing over it, engaged in transporting passengers, or heavily laden with agricultural produce or merchandize; and that either a very great expense must be annually incurred in repairs, or the road, in a short time, would be entirely broken up and become unfit for use. As no permanent provision had been made for these repairs, applications were made to Congress for the necessary funds; and as these demands upon the public treasury unavoidably increased, as the road was extended or longer in use, they naturally produced a strong feeling of dissatisfaction *and opposition in those portions [*164

of the union which had no immediate interest in the road; and the constitutional power of Congress to make these appropriations was also earnestly, and upon many applications, contested by many of the eminent statesmen of the country. It therefore became evident, that unless some other means than appropriations from the public treasury could be devised, a work which every one felt to be a great public convenience, in which a large portion of the union was directly and deeply interested, and which had been constructed at so much cost, must soon become a total ruin.

In this condition of things, the state of Ohio, on the 4th of February, 1831, passed an act, proposing, with the assent of Congress, to take under its care immediately the portion of the road within its limits which was then finished, and the residue from time to time as different parts of it should be completed, and to erect toll gates thereon, and to apply the tolls to the repair and preservation of the road, specifying in the law the tolls it proposed to demand, and containing a proviso in relation to the property of the United States, and to persons in its service, in the following words: "That no toll shall be received or collected for the passage of any stage or coach conveying the United States mail, or horses bearing the same, or any wagon or carriage laden with the property of the United States, or any cavalry or other troops, arms, or military stores, belonging to the same, or to any of the states comprising this union, or any person or persons on duty in the military service of the United States, or of the militia of any of the states." On the 2d of March, in the same year, Congress passed a law assenting to this act of Ohio, which is recited at large in the act of Congress, with all its provisions and stipulations.

The measure proposed by the state of Ohio seems to have been received with general approbation; and on the 4th of April, 1831, Pennsylvania, about two months after the passage of the law of Ohio, passed an act similar in its principles, but varying from it in some respects on account of the different condition of the road in the two states. In Ohio it was new and unworn, and therefore needed no repair, while in Pennsylvania, where it had been in use for several years, it was in a state of great dilapidation. While proposing, therefore, to take it under the care of the state, and to charge the tolls specified in the act, it annexed a condition that the United States should first put so much of it as passed through that state in good repair, and an appropriation be also made by Congress for erecting toll-houses and toll-gates upon it. The clause in relation to the passage of the property of the United

States over the road, also varies from the language of the Ohio law, and is in the following words: "That no toll shall be received or collected for the passage of any wagon or carriage laden with the property of *the United States, [*165 or any cannon or military stores belonging to the United States, or to any of the states composing this union."

The example of Pennsylvania was followed by Maryland and Virginia, at the next succeeding sessions of their respective legislatures: the law of Maryland being passed on the 23d of January, 1832, and the Virginia law on the 7th of February following. The proviso in relation to the property of the United States, in the Maryland act, is precisely the same with that of Pennsylvania, and would seem to have been copied from it, while the proviso in the Virginia law, upon this subject, follows almost literally the law of Ohio.

With these several acts of Assembly before them, Congress, on the 3d of July, 1832, passed a law declaring the assent of the United States to the laws of Pennsylvania and Maryland, to remain in force during the pleasure of Congress; and the sum of $150,000 was appropriated to repair the road east of the Ohio river, and to make the other needful improvements required by the laws of these two states. No mention is made of Virginia in this act of Congress, because in her law the previous reparation of the road, and the erection of toll-houses and gates, at the expense of the United States, was not in express terms made the condition upon which she accepted the surrender of the road; but the assent of Congress was afterwards given to her law by the act of March 2d, 1833, which, like the contract with the two other states, was to remain in force during the pleasure of Congress.

The sum appropriated, as above mentioned, was, however, found insufficient for the purposes for which it was intended, and by an act of June 24th, 1834, the further sum of $300,000 was appropriated; and this act states the appropriation to be made for the entire completion of the road east of the Ohio, and other needful improvements, to carry into effect the laws of Pennsylvania, Maryland, and Virginia, each of which is particularly referred to in the act of Congress; and further directs that as far as that sum is expended, or so much of it as shall be necessary, the road should be surrendered to the states respectively through which it passed. But so greatly had the road become dilapidated, that even these large sums were found inadequate to place it in a proper condition, and by the act of March 3d, 1835, the further sum of $346,138.58 was appropriated; but this law directed that no part of it should be paid or expended until the three states should

respectively accept the surrender; and that the United States "should not thereafter be subject to any expense in relation to the said road." Under this act of Congress the surrender was accordingly accepted, in 1835, and the money applied as directed by the act of Congress, and from that time the road has been in the possession of and under the control of the several states, with toll-gates upon it. This is the history of the road, and of the legislation of Congress and the states *upon that subject, (so far as it is necessary now to state it,) up to the time when the road passed into the hands of the states. We shall have occasion hereafter to speak more particularly of the act of Congress last mentioned, because it is the act under which the states finally took possession of the road.

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When the new arrangement first went into operation no toll was charged in any of the states upon carriages transporting the mail of the United States; and no toll upon such carriages has ever yet been claimed in Ohio, Maryland, or Virginia. But on the 13th of June, 1836, the state of Pennsylvania passed a law, declaring that carriages, &c., carrying the property of the United States or of a state, which were exempted from the payment of toll by the act of 1831, should thereafter be exempted only in proportion to the amount of property in such carriage belonging to the United States or a state, and, "that in all cases of wagons, carriages, stages, or other modes of conveyance, carrying the United States mail, with passengers or goods, such wagon, stage, or other mode of conveyance shall pay half-toll upon such modes of conveyance." And we are now to inquire whether this half-toll can be imposed upon carriages carrying the mail under the compact between the United States and Pennsylvania.

It will be seen from this statement, that the constitutional power of the general government to construct this road is not involved in the case before us; nor is this court called upon to express any opinion upon that subject; nor to inquire what were the rights of the United States in the road previous to the compacts hereinbefore mentioned. The road had in fact been made at the expense of the general government. It was the great line of connection between the seat of government and the western states and territories, affording a convenient and safe channel for the conveyance of the mails, and enabling the government thereby to communicate more promptly with its numerous officers and agents in that part of the United States west of the Alleghany mountains. The object of the compacts was to preserve the road for the purposes for which it had been made. The right of the several states to enter

into these agreements will hardly be questioned by any one. A state may undoubtedly grant to an individual or a corporation a right of way through its territory upon such terms and conditions as it thinks proper;[1] and we see no reason why it may not deal in like manner with the United States, when the latter have the power to enter into the contract. Neither do we see any just ground for questioning the power of Congress. The Constitution gives it the power to establish post-offices and post-roads; and charged, as it thus is, with the transportation of the mails, it would hardly have performed its duty to the country, if it had suffered this important line of communication to fall into utter ruin, and sought out, as it must have done, some circuitous or tardy and difficult route, when by the immediate payment *of an equivalent it obtained [*167 in perpetuity the means of performing efficiently a great public duty, which the Constitution has imposed upon the general government. Large as the sum was which it paid for repairs, it was evidently a wise economy to make the expenditure. It secured this convenient and important road for its mails, where the cost of transporting them is comparatively moderate, instead of being compelled to incur a far heavier annual expense, as they must have done, if, by the destruction of this road, they had been forced upon routes more circuitous or difficult, when much higher charges must have been demanded by the contractors. Certainly, neither Ohio, nor Pennsylvania, nor Maryland, nor Virginia, appear from their laws to have doubted their own power or the power of Congress. But we do not understand, that Pennsylvania now upon any ground disputes the validity of the compact or denies her obligation to perform it; on the contrary, she asserts her readiness to fulfil it in all its parts, according to its true meaning; but denies the construction placed upon it by the United States. It is to that part of the case, therefore, that it becomes the duty of the court to turn its particular attention.

It is true, that in the law of Pennsylvania, and of Maryland also, assented to by Congress, the exemption of carriages engaged in carrying the mail is not so clearly and specifically provided for as in the laws of Ohio and Virginia. But in interpreting these contracts the character of the parties, the relation in which they stand to one another, and the objects they evidently had in view, must all be considered.

[1] There is no doubt that the state may impose conditions and limitations upon corporations seeking to do business within its limits. *State* v. *Doyle*, 40 Wis., 175; s. c. 22 Am. Rep., 692; *Glen Falls Ins. Co.* v. *Judge of Jackson Circuit*, 21 Mich., 580; s. c. 4 Am. Rep., 504; *Morse* v. *Home Ins. Co.*, 39 Wis., 496; s. c. 11 Am. Rep., 580.

And we should hardly carry out their true meaning and intention if we treated the contract as one between individuals, bargaining with each other with adverse interests, and should apply to it the same strict and technical rules of construction that are appropriate to cases of that description. This, on the contrary, is a contract between two governments deeply concerned in the welfare of each other; whose dearest interests and happiness are closely and inseparably bound up together, and where an injury to one cannot fail to be felt by the other. Pennsylvania, most undoubtedly, was anxious to give to the general government every aid and facility in its power, consistent with justice to its own citizens, and the government of the United States was actuated by a like spirit.

This was the character of the parties and the relation in which they stood. Besides, a considerable number of the citizens of the state had a direct interest in the preservation of the road; and the state had manifested its sense of the importance of the work by the act of Assembly of 1807, which authorized the construction of the road within its limits; and again in the resolution passed in 1828, by which it proposed to confer upon Congress the power of erecting gates and charging toll. Yet the only value of this road to the general government worth considering is for the transportation of the *168] mails; and in that point of view it is far more important than *any other post-road in the union. Occasionally, indeed, arms or military stores may be transported over it; and sometimes a portion of the military force may pass along it. But these occasions for its use, especially in time of peace, but rarely occur; the daily and necessary use of the road by the United States is as a post-road, forming an almost indispensable link in the chain of communication from the seat of government to its western borders.

Now, as this was well known to the parties, can it be supposed that when Pennsylvania, by her act of 1831, proposed to take the road, and keep it in repair from the tolls collected upon it, and exempted from toll carriages laden with the property of the United States, she yet intended to charge it upon the mails? That in return for the large expenditure she required to be made, before she would receive the road, she confined her exemption to matters of no importance, and reserved the right to tax all that was of real value? And when Congress assented to the proposition, and incurred such heavy expenses for repairs, did they mean to leave their mails through Maryland and Pennsylvania still liable to the toll out of which the road was to be kept in repair? Upon this point

the act of Congress of March 3d, 1835, is entitled to great consideration. For it was under this law that the states finally took possession of the road and proceeded to collect the tolls. By so doing they assented to all the provisions contained in this act of Congress; and one of them is an express condition, that the United States should not thereafter be subject to any expense in relation to the road. Yet under the argument, the expenses of the road are to be defrayed out of the tolls collected upon it. And if the mails in Pennsylvania and Maryland may be charged, it will be found, that instead of the entire exemption, for which the United States so expressly stipulated, and to which Pennsylvania agreed, a very large proportion of the expenses of repair will be annually thrown upon them. We do not think that either party could have intended, when the contract was made, to burden the United States in this indirect way for the cost of repairs. So far as the general government is concerned, it might as well be paid directly from the Treasury. For nobody, we suppose, will doubt that this toll, although in form it is paid by the contractors, is in fact paid by the Post-office Department. It is not a contingent expense, which may or may not be incurred, and about which a contractor may speculate; but a certain and fixed amount, for which he must provide, and which, therefore, in his bid for the contract he must add to the sum he would be otherwise willing to take. It is of no consequence to the United States whether charges for repairs are cast upon it through its Treasury or Post-office Department. In either case it is not free from expense in relation to the road, according to the compact upon which it was surrendered to and accepted by the states.

Neither do the words of the law of Pennsylvania of 1831 require [*169 a different construction. The United States have unquestionably a property in the mails. They are not mere common carriers, but a government, performing a high official duty in holding and guarding its own property as well as that of its citizens committed to its care; for a very large portion of the letters and packages conveyed on this road, especially during the session of Congress, consists of communications to or from the officers of the executive department, or members of the legislature, on public service or in relation to matters of public concern. Nor can the word *laden* be construed to mean *fully laden*, for that would in effect destroy the whole value of the exemption, and compel the United States to pay a toll even on its military stores and other property, unless every wagon or carriage employed in transporting it was as heavily laden as it could con-

veniently bear. We think that a carriage, whenever it is carrying the mail, is laden with the property of the United States within the true meaning of the compact: and that the act of Congress of which we have spoken, and to which the state assented, must be taken in connection with the state law of 1831 in expounding this agreement. Consequently the half-toll imposed by the act of 1836 cannot be recovered.

The acts of assembly of Ohio and Virginia have been relied on in the argument by the plaintiff in error; and it has been urged that, inasmuch as the laws of these states, in so many words, exempt carriages carrying the mail of the United States, the omission of these words in the law in question shows that Pennsylvania intended to reserve the right to charge them with toll. And it is moreover insisted that, as the law of Ohio which contains this provision passed some time before the act of Pennsylvania, it ought to be presumed that the law of the latter was drawn and passed with a full knowledge of what had been done by the former, and that the stipulation in favor of the mail was designedly and intentionally omitted, because the state of Pennsylvania meant to reserve the right to charge it.

The court think otherwise. Even if the law of Ohio is supposed to have been before the legislature of Pennsylvania, it does not by any means follow that the omission of some of its words would justify the inference urged in the argument, where the words retained, by their fair construction, convey the same meaning. Indeed, if it appeared that the Ohio law was in fact before the legislature of Pennsylvania when it framed its own act upon the subject, it would rather seem to lead to a contrary conclusion. For it cannot be supposed that in the compact which the United States was about to form with four different states, and when the agreement with one would have been of no value without the others, Pennsylvania would have desired or asked for any privileges to herself which were not extended to the other states, nor that she
*170] would be less anxious to give every facility in her power to the general *government when carrying out through her territory the important and necessary operations of the Post-office Department. Nor could she have supposed that Congress would give privileges to one state which were denied to others; and, after having done equal justice to all in the repair and preparation of the road wherever needed, make different contracts with the different states; and, while it bargained for the exemption of its mails in one or more of them, consent to pay toll in another. The fact that they are clearly and explicitly exempted from toll in Ohio and Virginia

is a strong argument to show that it was intended to exempt them in all, and that the compacts with Pennsylvania and Maryland were understood and believed to mean the same thing, and to accomplish the same objects. And this conclusion is greatly strengthened by the fact that Maryland, where the words of the law are precisely the same with those of Pennsylvania, has never claimed the right to exact toll from carriages carrying the mail; nor did Pennsylvania claim it in the first instance, and they were always allowed to pass free until the act of 1836. Indeed that law itself appears to recognise the right of the mail and other property of the United States to go free, and the imposition of only half-toll would seem to imply that the state intended to reach other objects, and did not desire to lay the burden upon any thing that properly belonged to the United States. And so far as we can judge from its legislation, Pennsylvania has never to this day placed any other construction upon its compact than the one we have given, and has never desired to depart from it.

If we are right in this view of the subject, the error consists in the mode by which the state endeavored to attain its object. Unquestionably the exemption of carriages bearing the mail is no exemption of any other property conveyed in the same vehicle, nor of any person travelling in it, unless he is in the service of the United States, and passing along in pursuance of orders from the proper authority. Upon all other persons, although travelling in the mail-stage, and upon their baggage or any other property, although conveyed in the same carriage with the mail, the state of Pennsylvania may lawfully collect the same toll that she charges either upon passengers or similar property in other vehicles. If the state had made this road herself, and had not entered into any compact upon the subject with the United States, she might undoubtedly have erected toll-gates thereon, and if the United States afterwards adopted it as a post-road, the carriages engaged in their service in transporting the mail, or otherwise, would have been liable to pay the same charges that were imposed by the state on other vehicles of the same kind. And as any rights which the United States might be supposed to have acquired in this road have been surrendered to the state, the power of the latter is as extensive in collecting toll as if the road had been made by herself, except *in so far as she is re- [*171
stricted by her compact; and that compact does nothing more than exempt the carriages laden with the property of the United States, and the persons and baggage of those who are engaged in their service. Toll may therefore be imposed upon

every thing else in any manner passing over the road; restricting, however, the application of the money collected to the repair of the road, and to the salaries and compensation of the persons employed by the state in that duty.

It has been strongly pressed in the argument, that the construction placed upon the compact by the court would enable the contractors to drive every other line of stages from the road, by dividing the mail-bags among a multitude of carriages, each of which would be entitled to pass toll free, while the rival carriages would be compelled to pay it. And that by this means the contractors for carrying the mail would in effect obtain a monopoly in the conveyance of passengers throughout the entire length of the road, greatly injurious to the public, by lessening that disposition to accommodate which competition is sure to produce, and enhancing the cost of travelling beyond the limits of a fair compensation.

The answer to this argument is, that under the agreement they have made, according to its just import, the United States cannot claim an exemption for more carriages than are necessary for the safe, speedy, and convenient conveyance of the mail. And if measures such as are suggested were adopted by the contractors, it would be a violation of the compact. The postmaster-general has unquestionably the right to designate not only the character and description of the vehicle in which the mail is to be carried, but also the number of carriages to be employed on every post-road. And it can scarcely, we think, be supposed, that any one filling that high office, and acting on behalf of the United States, would suffer the true spirit and meaning of the contract with the state to be violated or evaded by any contractor acting under the authority of his department. But undoubtedly, if such a case should ever occur, the contract, according to its true construction, could be enforced by the state in the courts of justice; and every carriage beyond the number reasonably sufficient for the safe, speedy, and convenient transportation of the mail would be liable to the toll imposed upon similar vehicles owned by other individuals. In a case where an error in the post might be so injurious to the public, it would certainly be necessary that the abuse should be clearly shown before the remedy was applied. But there can be no doubt, that the compact in question, in the case supposed, would not shield the contractor, and upon a case properly made out and established, it would be the duty of a court of justice to enforce the payment of the tolls. No such fact, however, appears or is suggested in the case before us, and the judgment of the Circuit Court is therefore affirmed.

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*Mr. Justice McLEAN.

I dissent from the opinion of the court. And as the case involves high principles and, to some extent, the action and powers of a sovereign state, I will express my opinion.

This was an amicable action to try whether the defendants, who are contractors for the transportation of the mail on the Cumberland road, are liable, under the laws of Pennsylvania, to pay toll for stages in which the mail of the United States is conveyed.

This road was constructed by the federal government through the state of Pennsylvania, with its consent. Whether this power was thus constitutionally exercised, is an inquiry not necessarily involved in the decision of this case. The road was made, and for some years it was occasionally repaired by appropriations from the treasury of the United States. These appropriations were made with reluctance at all times, and sometimes were defeated. This, as a permanent system of keeping the road in repair, was, of necessity, abandoned; and, with the assent of Pennsylvania, Congress passed a bill to construct toll-gates and impose a tax on those who used the road. This bill was vetoed by the President, on the ground that Congress had no constitutional power to pass it. The plan was then adopted to cede the road, on certain conditions, to the states through which it had been established.

On the 4th of April, 1831, Pennsylvania passed "An act for the preservation of the Cumberland road."

By the 1st section it was provided, that as soon as the consent of the government of the United States shall have been obtained, certain commissioners, who were named, were to be appointed, whose duties in regard to the road were specially defined. The 2d section enacted, that to keep so much of the road in repair as lies in the state of Pennsylvania, and pay the expense of collection, &c., the commissioners should cause six toll-gates to be erected, and certain rates of toll were established. To this section there was a proviso, "that no toll shall be received or collected for the passage of any wagon or carriage laden with the property of the United States, or any cannon or military stores belonging to the United States or to any of the states composing the union."

By the 4th section the tolls were to be applied, after paying expenses of collection, &c., to the repairs of the road, the commissioners having power to increase them, provided they shall not exceed the rates of toll on the Harrisburg and Pittsburg road. The last section provided that the toll should not be altered below or above a sum necessary to defray the expenses incident to the preservation and repair of said road

&c., and also, "that no change, alteration, or amendment shall ever be adopted, that will in any wise defeat or affect the true intent and meaning of this act."

By the 10th section of the above act it was declared to have *173] no effect until Congress should assent to the same, "and until so much *of the said road as passes through the state of Pennsylvania be first put in a good state of repair, and an appropriation made by Congress for erecting toll-houses and toll-gates thereon, to be expended under the authority of the commissioners appointed by this act."

By their act of the 24th of June, 1834, Congress appropriated $300,000 to repair the Cumberland road east of the Ohio river, which referred to the above act of Pennsylvania, and also to similar acts passed by Virginia and Maryland. And in the 4th section of the act it was provided, "that as soon as the sum by this act appropriated, or so much thereof as is necessary, shall be expended in the repair of said road agreeably to the provisions of this act, the same shall be surrendered to the states respectively through which said road passes; and the United States shall not thereafter be subject to any expense for repairing said road." This surrender of the road was accepted by Pennsylvania, by an act of the 1st of April, 1835.

The above acts constitute the compact between the state of Pennsylvania and the union, in regard to the surrender of this road. The nature and extent of this compact are now to be considered.

As before remarked, the constitutional power of Congress to construct this road is not necessarily involved in this decision. By the act of Congress of the 30th of April, 1802, to authorize the people of Ohio to "form a constitution and state government," among other propositions for the acceptance of the state, it was proposed that "five per cent. of the net proceeds of the lands lying within the said state, sold by Congress, should be applied to the laying out and making public roads leading from the navigable waters falling into the Atlantic, to the Ohio, to the said state, and through the same; such roads to be laid under the authority of Congress, with the consent of the several states through which the roads shall pass: provided the state shall agree not to tax land sold by the government until after the expiration of five years from the time of such sale."

By the 2d section of the act of the 3d March, 1803, three per cent. of the above fund was placed at the disposition of the state, to be "applied to the laying out, opening, and making roads, within the state."

The above conditions, having been accepted by Ohio, consti-

tuted the compact under which the Cumberland road was laid out and constructed by the authority of Congress. And of this work it may be said, however great has been the expenditure through the inexperience or unfaithfulness of public agents, that no public work has been so diffusive in its benefits to the country. It opened a new avenue of commerce between the eastern and western states. Since its completion, and while it was kept in repair, the annual transportation of goods and travel on it saved an expense equal to no inconsiderable part of the cost of the road. But its cession to the [*174 states *through which it was established was found necessary to raise, by tolls, an annual revenue for its repair.

Whatever expenditure was incurred in the construction of this road beyond the two per cent. reserved by the compact with Ohio, was amply repaid by the beneficial results of the work; and this was the main object of Congress. It was a munificent object, and worthy of the legislature of a great nation.

The road was surrendered to Pennsylvania and the other states through which it had been constructed. But what was ceded to Pennsylvania? All the right of the United States which was not reserved by the compact of cession. This right may be supposed to arise from the compact with Ohio; the consent of Pennsylvania to the construction of the road, and the expense of its construction, including the sums paid to individuals for the right of way. These, and whatever jurisdiction over the road, if any, might be exercised by the United States, were surrendered to Pennsylvania. The road then must be considered as much within the jurisdiction and control of Pennsylvania, excepting the rights reserved in the compact, as if it had been constructed by the funds of that state. It is, therefore, important to ascertain the extent of the rights reserved by the United States.

In the closing paragraph of the 2d section of the act of 1831, above cited, it is provided, "that no toll shall be received or collected for the passage of any wagon or carriage laden with the property of the United States, or any cannon or military stores belonging to the United States, or to any of the states composing this union." In addition to this, there were certain limitations imposed, as to the amount of tolls, on the state of Pennsylvania, which need not now be considered.

Some light may be cast on the import of the above reservation by a reference to somewhat similar compacts made in regard to the same subject between the United States and the states of Ohio, Maryland, and Virginia. The Ohio act of the

2d of March, 1831, provides, in the 4th section, "that no toll shall be received or collected for the passage of any stage or coach conveying the United States mail, or horses bearing the same, or any wagon or carriage laden with the property of the United States, or any cavalry or other troops, arms, or military stores, belonging to the same, or to any of the states comprising this union, or any person or persons on duty in the military service of the United States, or of the militia of any of the states." The 4th section of the Maryland act of the 23d of January, 1832, provided, "that no tolls shall be received or collected for the passage of any wagon or carriage laden with the property of the United States, or any cannon or military stores belonging to the United States, or to any of the states composing this union." In the Virginia act of the 7th of February, 1832, it is provided, "that no toll shall be *175] received or collected for the passage of any *stage or coach conveying the United States mail, or horses bearing the same, or any wagon or carriage laden with property of the United States, or any cavalry or other troops, army or military stores, belonging to the same, or to any of the states comprising this union, or any person or persons on duty in the military service of the United States, or of the militia of any of the states."

The reservations in the Pennsylvania and Maryland acts are the same, and differ materially from those contained in the acts of Ohio and Virginia. In the latter acts the mail-stage is excepted, but not in the former. Pennsylvania and Maryland exempt from toll "any wagon or carriage laden with the property of the United States;" but the same exemption is contained in the Ohio and Virginia laws in addition to that of the mail-stage. Now, can the reservations in these respective acts be construed to mean the same thing? Is there no difference between the acts of Ohio and Pennsylvania? Their language is different, and must not their meaning be sought from the words in the respective acts? They are separate and distinct compacts. The Ohio law was first enacted, and was, probably, before the legislature of Pennsylvania when their act was passed. But whether this be the fact or not, they were both sanctioned by Congress; and the question is, whether both compacts are substantially the same? That the legislatures did not mean the same thing seems to me to be clear of all doubt. Did Congress, in acceding to these acts, consider that they were of the same import? Such a presumption cannot be sustained without doing violence to the language of the respective acts.

In both acts wagons laden with the property of the United

States are exempted. In the Ohio act the mail-stage is exempted from toll, but not in the act of Pennsylvania. Now, is the mail-stage exempted from toll by both acts or by neither? Is not either of these positions equally unsustainable? The exemption of the mail-stage must be struck out of the Ohio law to sustain one of these positions, and to sustain the other it must be inserted in the act of Pennsylvania. Does not the only difference consist in striking out in the one case and inserting in the other? This must be admitted unless the words, "wagon or carriage laden with the property of the United States," mean one thing in the Ohio law, and quite a different thing in the law of Pennsylvania. These words have a sensible and obvious application in both acts, without including the mail-stage. In the Ohio law the words "no toll shall be received or collected for the passage of any stage or coach conveying the United States mail," cannot, by any sound construction, be considered as surplusage; and yet they must be so considered if the Pennsylvania act exempt the mail-stage.

When one speaks of transporting the property of the United States, the meaning of the terms "property of the United States," is never mistaken. They mean munitions of war, provisions purchased *for the support of the army, [*176 and any other property purchased for the public revenue. They do not mean the mail of the United States. A wagon laden with property is understood to be a wagon used for the transportation of property, in the ordinary sense of such terms. A wagon or carriage being laden is understood to have a full or usual load. The mail-stage of the United States is never spoken of in this sense. It is used for the transportation of passengers as well as the mail, and in this view it is undoubtedly considered when spoken of in conversation, and especially when referred to in a legislative act. In no sense can the mail-stage be considered a "carriage laden with the property of the United States." The same exception applies to a wagon or carriage laden with the property of a state. Now no one can doubt the meaning of the exception thus applied. And can a different meaning be given to the same words when applied to the United States? Certainly not, unless the mail can be denominated the property of the United States.

The mail of the United States is not the property of the United States. What constitutes the mail? Not the leathern bag, but its contents. A stage load of mail-bags could not be called the mail. They might be denominated the property of the United States, but not the mail. The mail consists of packets of letters made up with post-bills, and directed to certain post-offices for distribution or delivery; and whether

these be conveyed in a bag or out of it, they are equally the mail; but no bag without them is or can be called the mail. Can these packets be said to be the property of the United States? The letters and their contents belong to individuals. No officer in the government can abstract a letter from the mail, not directed to him, without incurring the penalty of the law. And can these letters or mailed pamphlets or newspapers be called the property of the United States? They in no sense belong to the United States, and are never so denominated. If a letter be stolen from the mail which contains a bank-note, the property in the note is laid in the person who wrote the letter in which the note is enclosed. From these views I am brought to the conclusion that neither party to the compact under consideration could have understood "a wagon or carriage laden with the property of the United States," as including the mail-stage of the United States.

Are there any considerations connected with this subject which lead to a different conclusion from that stated. The fact that four distinct compacts were entered into with four states to keep this road in repair, cannot have this effect. We must judge of the intention of the parties to the compact by their language. I know of no other rule of construction. Two of these compacts exempt the mail-stage from toll, and two of them do not exempt it. Now, if the same con-
*177] struction, in this respect, must be given to all of them, *which of the alternatives shall be adopted? Shall the mail-stage be exempted by all of them, or not exempted by any of them?

What effect can the expenditures of the United States, in the construction of this road, have upon this question? In my judgment, none whatever. The reservation must be construed by its terms, and not by looking behind it. The federal government has been amply repaid for the expenditures in the construction of this road, great and wasteful as they may have been, by the resulting benefits to the nation. It is now the road of Pennsylvania, subject only to the terms of the compact. In the act surrendering this road to the states respectively, through which it passes, Congress say, "and the United States shall not thereafter be subject to any expense for repairing said road." To get clear of this expense was the object of the cession of it to the states. But does this affect the question under consideration? The repairs of the road are provided for, by the tolls which the state of Pennsylvania is authorized to impose. And this is the meaning of the above provision. It is supposed, that the exaction of toll on the mail-stage would conflict with that provision. But how does

it conflict with it? The toll on the mail-stage is not paid by the government, but by the contractor. And whether this toll will increase the price paid by the government for the transportation of the mail, is a matter that cannot be determined. Competition is invited and bids are made for this service, and the price to be paid depends upon contingent circumstances. The toll would be paid, in part, if not in whole, by a small increase of price for the transportation of passengers. The profits of the contractor might, perhaps, be somewhat lessened by the toll, or it might increase, somewhat, the cost of conveying the mail. But this is indirect and contingent; so that in no sense can it be considered as repugnant to the above provision. "The United States are not to be subject to any expense for repairing this road;" and they are not, in the sense of the law, should the Post-office Department have to pay, under the contingencies named, a part of the toll stated. Whether it does pay it or not, under future contracts, cannot be known; and whatever expense it may pay, will be for the use, and not the repair, of the road.

The act of the 13th of June, 1836, which is supposed to be in violation of the compact, I will now consider. That act provides, "That all wagons, carriages, or other modes of conveyance, passing upon that part of the Cumberland road which passes through Pennsylvania, carrying goods, cannon, or military stores belonging to the United States, or to any individual state of the union, which are excepted from the payment of toll by the second section of an act passed the 4th of April, 1831, shall extend only so far as to relieve such wagons, carriages, and other modes of conveyance, from the payment of toll to the proportional amount of such goods *so [*178 carried belonging to the United States, or to any of the individual states of the union; and that in all cases of wagons, carriages, stages, or other modes of conveyance, carrying the United States mail, with passengers or goods, such wagon, stage, or other mode of conveyance, shall pay half-toll upon such modes of conveyance."

By the act of 1831, "every chariot, coach, coachee, stage, wagon, phaeton, or chaise, with two horses and four wheels, were to be charged at each gate twelve cents; for either of the carriages last mentioned, with four horses, eighteen cents." Is the act of 1836, which imposes half-toll on "the mail-stage, with passengers or goods," repugnant to the above provision? I think it is not, in any respect.

If the mail be not the property of the United States, then the stage in which it is conveyed is not within the exception of the act of 1831, and it is liable to pay toll. That only

which is within the exception is exempted. That the mail is in no sense the property of the United States, and was not so understood by the parties to the compact, has already been shown. It follows, therefore, that a law of Pennsylvania, imposing on such stage a half or full rate of toll, is no violation of the compact.

But, if the mail-stage were placed on a footing with a wagon or carriage laden with the property of the United States, is the act of 1836, requiring it to pay toll, a violation of the compact? I think it is not. A wagon or carriage laden with the property of the United States, means a wagon or carriage having, as before remarked, a full or usual load. Such a vehicle is exempted from toll by the act of 1831. But suppose such wagon or carriage should have half its load of the property of the United States, and the other half of the property of individuals, for which the ordinary price for transportation was paid; is such a wagon, thus laden, exempted from toll? Surely it is not. An exemption under such circumstances would be a fraud upon the compact. It should be required to pay half-toll, and this is what the law of Pennsylvania requires. The mail-stage by that law is only half-toll, when it conveys passengers with the mail. There is, then, no legal objection to the exaction of this toll. It is in every point of view just, and within the spirit of the compact.

In the argument for the United States, the broad ground was assumed, that no state had the power to impose a toll on a stage used for the transportation of the mail. That it is a means of the federal government to carry into effect its constitutional powers, and, consequently, is not a subject of state taxation. To sustain this position the cases of *McCulloch* v. *The State of Maryland*, 4 Wheat., 316, and *Dobbins* v. *The Commissioners of Erie County*, 16 Pet., 435, were cited.

*179] In the first case, this court held, "that a state government had no *right to tax any of the constitutional means employed by the government of the union, to execute its constitutional powers." And the Bank of the United States was held to be a means of the government. In the second case, under a general law of Pennsylvania imposing a tax on all officers, a tax was assessed on the office held by the plaintiff, as captain of a revenue-cutter of the United States, and this court held that such law, so far as it affected such an officer, was unconstitutional and void. The court say, "there is a concurrent right of legislation in the states and the United States, except as both are restrained by the Constitution of the United States. Both are restrained by express prohibitions in the Constitution; and the states by such as are reciprocally

implied when the exercise of a right by a state conflicts with the perfect execution of another sovereign power delegated to the United States. That occurs when taxation by a state acts upon the instruments and emoluments and persons which the United States may use and employ as necessary and proper means to execute their sovereign power."

Neither of these cases reach or affect the principle involved in the case under consideration. The officer of the United States was considered as a means or instrument of the government, and, therefore, could not be taxed by the state as an officer. To make that case the same in principle as the one before us, the officer must claim exemption from toll as a means of the government, in passing over a toll-bridge or turnpike-road constructed by a state, or by an association of individuals under a state law. The principle of the other case is equally inapplicable. Maryland taxed the franchise of the Bank of the United States, and if the law establishing that bank were constitutional, the franchise was no more liable to taxation by a state than rights and privileges conferred on one or more individuals, under any law of the union. With the same propriety a judge of the United States might be subjected to a tax by a state for the exercise of his judicial functions. And so of every other officer and public agent. But the court held that the stock in the bank owned by a citizen might be taxed.

A toll exacted for the passage over a bridge or on a turnpike road is not, strictly speaking, a tax. It is a compensation for a benefit conferred. Money has been expended in the construction of the road or bridge, which adds greatly to the comforts and facilities of traveling, and on this ground compensation is demanded. Now, can the United States claim the right to use such road or bridge free from toll? Can they place locomotives on the railroads of the states or of companies, and use them by virtue of their sovereignty? Such acts would appropriate private property for public purposes, without compensation; and this the Constitution of the union prohibits.

It is said, in the argument, that as well might a revenue-cutter be taxed by a state as to impose a toll on the stage which conveys the mail. The revenue-cutter plies on [*180 the thoroughfare of nations or of *the state, which is open to all vessels. But the stage passes over an artificial structure of great expense, which is only common to all who pay for its use a reasonable compensation. There can be no difficulty on this point. At no time, it is believed, has the Post-office Department asserted the right to use the turnpike-

roads of a state, in the transmission of the mail, free from toll.

Pennsylvania stands pledged to keep the road in repair, by the use of the means stipulated in the compact. And she has bound herself, "that no change, alteration, or amendment shall ever be adopted that will in any wise defeat or affect the true intent and meaning of the act of 1831." In my judgment, that state has in no respect violated the compact by the act of 1836. If the mail-stage can be included in the exemption by the terms, "wagon or carriage laden with the property of the United States," still the half-toll on such stage, when it contains passengers, is within the compact. But, as has been shown, the mail-stage is not included in the exemption, and, consequently, it was liable to be charged with full toll. The state, therefore, instead of exceeding its powers under the compact, has not yet exercised them to the extent which the act of 1831 authorizes.

Mr. Justice DANIEL.

With the profoundest respect for the opinions of my brethren, I find myself constrained openly to differ from the decision which, on behalf of the majority of the court, has just been pronounced. This case, although in form a contest between individuals, is in truth a question between the government of the United States and the government of Pennsylvania. It is, to a certain extent, a question of power between those two governments; and, indeed, so far as it is represented to be a question of compact, the very consideration on which the interests of the federal government are urged involves implications affecting mediately or directly what are held to be great and fundamental principles in our state and federal systems. It brings necessarily into view the operation and effect of the compact insisted upon as controlled and limited by the powers of both the contracting parties. In order to show more plainly the bearing of the principles above mentioned upon the case before us, they will here be more explicitly, though cursorily, referred to.

I hold, then, that neither Congress nor the federal government in the exercise of all or any of its powers or attributes possesses the power to construct roads, nor any other description of what have been called internal improvements, within the limits of the states. That the territory and soil of the several states appertain to them by title paramount to the Constitution, and cannot be taken, save with the exceptions of those portions thereof which might be ceded for the seat of the federal government and for sites permitted to be purchased

for forts, arsenals, dock-yards, &c., &c. That the power of *the federal government to acquire, and that of the states to cede to that government portions of their territory, are by the Constitution limited to the instances above adverted to, and that these powers can neither be enlarged nor modified but in virtue of some new faculty to be imparted by amendments of the Constitution. I believe that the authority vested in Congress by the Constitution to establish post-roads, confers no right to open new roads, but implies nothing beyond a discretion in the government in the regulations it may make for the Post-office Department for the selection amongst various routes, whilst they continue in existence, of those along which it may deem it most judicious to have the mails transported. I do not believe that this power given to Congress expresses or implies any thing peculiar in relation to the means or modes of transporting the public mail, or refers to any supposed means or modes of transportation beyond the usual manner existing and practised in the country, and certainly it cannot be understood to destroy or in any wise to affect the proprietary rights belonging to individuals or companies vested in those roads. It guaranties to the government the right to avail itself of the facilities offered by those roads for the purposes of transportation, but imparts to it no exclusive rights—it puts the government upon the footing of others who would avail themselves of the same facilities.

In accordance with the principles above stated, and which with me are fundamental, I am unable to perceive how the federal government could acquire any power over the Cumberland road by making appropriations, or by expending money to any amount for its construction or repair, though these appropriations and expenditures may have been made with the assent, and even with the solicitation of Pennsylvania. Neither the federal government separately, nor conjointly with the state of Pennsylvania, could have power to repeal the Constitution. Arguments drawn from convenience or inconvenience can have no force with me in questions of constitutional power; indeed, they cannot be admitted at all, for if once admitted, they sweep away every barrier erected by the Constitution against implied authority, and may cover every project which the human mind may conceive. It matters not, then, what or how great the advantage which the government of the United States may have proposed to itself or to others in undertaking this road; such purposes or objects could legitimate no acts either expressly forbidden or not plainly authorized. If the mere appropriation or disbursement of money can create rights in the government, they may extend this principle

indefinitely, and with the very worst tendencies—those tendencies would be the temptation to prodigality in the government and a dangerous influence with respect to others.

In my view, then, the federal government could erect no toll-gates nor make any exaction of tolls upon this road; nor *182] could that government, in consideration of what it had done or contributed, *constitutionally and legally demand of the state of Pennsylvania the regulation of tolls either as to the imposition of particular rates or the exemption of any species of transportation upon it. As a matter of constitutional and legal power and authority, this appertained to the state of Pennsylvania exclusively. Independently, then, of any stipulations with respect to them, vehicles of the United States, or vehicles transporting the property of the United States, and that property itself, would, in passing over this road, be in the same situation precisely with vehicles and property appertaining to all other persons; they would be subject to the tolls regularly imposed by law. There can be no doubt if the road were vested in a company or in a state, that either the company or the state might stipulate for any rate of toll within the maximum of their power, or might consent to an entire exemption; and such stipulation, if made for a valuable or a legal consideration, would be binding.

The United States may contract with companies or with communities for the transportation of their mails, or any of their property, as well as with carriers of a different description; and consequently could contract with the state of Pennsylvania. But what is meant to be insisted on here is, that the government could legally claim no power to collect tolls, no exemption from tolls, nor any diminution of tolls in their favor, purely in consequence of their having expended money on the road, and without the recognition by Pennsylvania of that expenditure as a condition in any contract they might make with that state. Without such recognition, the federal government must occupy the same position with other travellers or carriers, and remain subject to every regulation of her road laws which the state could legally impose on others.

This brings us to an examination of the statutes of Pennsylvania, and to an inquiry into any stipulations which the state is said to have made with the federal government, as declared in those statutes. That examination will, however, be premised by some observations, which seem to be called for on this occasion. These acts of the Pennsylvania legislature have been compared with the acts of other legislative bodies relative to this road, and it has been supposed that the Penn

sylvania laws should be interpreted in conjunction with those other state laws, and farther, that all these separate state enactments should be taken, together with the acts of Congress passed as to them respectively, as forming one, or as parts of one entire compact with the federal government. I cannot concur in such a view of this case. On the contrary, I must consider each of the states that have legislated in respect to this road, as competent to speak for herself; as speaking in reference to her own interests and policy, and independently of all others; and unshackled by the proceedings of any others. By this rule of construction let us examine the statutes of Pennsylvania. The act of April 4th, 1831, which may be called the compact law, as it contains all that Pennsylvania professed to undertake, *begins by stating the doubts which were entertained upon the authority of the United States to erect toll-gates and to collect tolls on the Cumberland road; doubts which, with the government as well as with others, seem to have ripened into certainties, inasmuch as, notwithstanding its large expenditures upon this road, the government had never exacted tolls for travelling or for transportation upon it. The statute goes on next to provide, that if the government of the United States will make such farther expenditures as shall put the road lying within the limits of Pennsylvania in complete repair, Pennsylvania will erect toll-gates and collect tolls upon the road, to be applied to the repairs and preservation of it. The same act invests the commissioners it appoints to superintend the road, with power to increase or diminish the tolls to be levied; limiting the increase by the rates which the state had authorized upon an artificial road that she had established from the Susquehanna, opposite the borough of Harrisburg, to Pittsburg. Then in the act of 1831 are enumerated the subjects of toll, and the rates prescribed as to each of those subjects. Amongst the former are mentioned chariots, coaches, coachees, stages, wagons, phaetons, chaises. In the 3d proviso to the 2d section it is declared, "that no toll shall be received or collected for the passage of any wagon or carriage laden with the property of the United States, or any cannon or military stores belonging to the United States, or to any of the states belonging to this union." On the 13th of June, 1836, was passed by the legislature of Pennsylvania, "An act relating to the tolls on that part of the Cumberland road which passes through Pennsylvania." The 1st section of this act is in the following words: "All wagons, carriages, or other modes of conveyance, passing upon that part of the Cumberland road which [*183

passes through Pennsylvania, carrying goods, cannon, or military stores, belonging to the United States, or to any individual state of the union, which are excepted from the payment of toll by the second section of an act passed the fourth of April, anno Domini eighteen hundred and thirty-one, shall extend only so far as to relieve such wagons, carriages, and other modes of conveyance, from the payment of toll to the proportional amount of such goods so carried, belonging to the United States, or to any of the individual states of the union; and that in all cases of wagons, carriages, stages, or other modes of conveyance, carrying the United States mail, with passengers or goods, such wagon, stage, or other mode of conveyance, shall pay half-toll upon such modes of conveyance."

Upon the construction to be given to the 1st and 2d sections of the statute of 1831, and to the 1st section of the statute of 1836, depends the decision of the case before us. By the defendant in error it is insisted that, by the sections of the act of 1831 above cited, stages or stage-coaches, transporting the mail of the United States, are wholly exempted by compact from the payment of tolls, although the mails may *184] constitute but a small portion of their lading; and *those vehicles may be at the same time freighted for the exclusive profit of the mail contractors, with any number of passengers, or with any quantity of baggage or goods, which can be transported in them, consistently with the transportation of the mail; and that the 1st section of the act of 1836, which declares that "in all cases of wagons, carriages, stages, or other modes of conveyance, carrying the United States mail, with passengers or goods, such wagon, stage, or other mode of conveyance, shall pay half-toll upon such mode of conveyance," is a violation of the compact. Let us pause here, and inquire what was the natural and probable purpose of the exemption contained in the act of 1831? Was that exemption designed as a privilege or facility to the government, or as a donation for private and individual advantage? Common sense would seem to dictate the reply, that the former only was intended by the law; and even if the privilege or facility to the government could be best secured by associating it with individual profit, certainly that privilege or facility could, on no principle of reason or fairness, be so sunk, so lost sight of, so entirely perverted, as to make it a mean chiefly of imposition and gain on the part of individuals, and the cause of positive and serious public detriment; and such must be the result of the practice contended for by the defendants in error, as it would tend to impede the

celerity of transportation, and to destroy the road itself, by withholding the natural and proper fund for its maintenance. Passing then from what is believed to be the natural design of these enactments, let their terms and language be considered. By those of the 2d section of the law of 1831, every stage or wagon is made expressly liable to toll, without regard to the subjects it might transport, and without regard to the ownership of the vehicle itself. The terms of the law are universal; they comprehend all stages and all wagons; they would necessarily, therefore, embrace stages and wagons of the United States, or the like vehicles of others carrying the property of the United States or of private persons. If, then, either the vehicles of the United States, or of others carrying the property of the United States, have been withdrawn from the operation of the act of 1831, this can have been done only by force of the 3d proviso of the 2d section of that act. The proviso referred to declares that no toll shall "be collected for the passage of any wagon or carriage laden with the property of the United States," &c., &c. Can this proviso be understood as exempting stages, whether belonging to the government or to individuals, which were intended purposely to carry the MAIL? It is not deemed necessary, in interpreting this proviso, to discuss the question, whether the United States have a property in mails which they carry. It may be admitted that the United States and all their contractors have in the mails that property which vests by law in all common carriers; it may be admitted that the United States have an interest in the mails even beyond this. These admissions do not vary the real inquiry here, *which is, [*185 whether by this proviso the mails of the United States, or the carriages transporting them, were intended to be exempted from tolls? This law, like every other instrument, should be interpreted according to the common and received acceptation of its words; and artificial or technical significations of words or phrases should not be resorted to, except when unavoidable, to give a sensible meaning to the instrument interpreted; or when they may be considered as coming obviously within the understanding and contemplation of the parties. According to this rule of interpretation, what would be commonly understood by "the property of the United States," or by the phrase "wagons and carriages laden with the property of the United States?" Would common intendment apply those terms to the *mail* of the United States, or to vehicles carrying that mail? The term "mail" is perhaps universally comprehended as being that over which the government has the management for the purposes of conveyance

and distribution; and it would strike the common understanding as something singular, to be told that the money or letters belonging to the citizen, and for the transportation of which he pays, was not his property, but was the property of the United States. The term "mail," then, having a meaning clearly defined and universally understood, it is conclusive to my mind, that in a provision designed to exempt that mail, or the vehicle for its transportation, the general and equivocal term "property" would not have been selected, but the terms "mail," and "stages carrying the mail"—terms familiar to all—would have been expressly introduced.

Farther illustration of the language and objects of the legislature of Pennsylvania may be derived from the circumstance, that, in the law of 1831, they couple the phrase "property of the United States" with "property of the states." The same language is used in reference to both; they are both comprised in the same sentence; the same exemption is extended to both. Now the states have no mails to be transported. It then can by no means follow, either by necessary or even plausible interpretation, that by "property of the United States" was meant the "mails of the United States," any more than by "property of the states" was meant the "mails" of those states; on the contrary, it seems far more reasonable that the legislature designed to make no distinction with regard to either, but intended that the term "property" should have the same signification in reference both to the state and federal governments.

In the acceptation of the term "property," insisted on for the defendants in error, the mails committed to the contractor are the property of that contractor also. Yet it would hardly have been contended that in a provision for exempting the "property" of a mail contractor from tolls, either a vehicle belonging to the United States, and in the use of such a contractor, or the mail which he carried in it, would be so considered as his property as to bring them within that exemption; *186] yet such is the conclusion to which the interpretation contended *for by the defendants would inevitably lead. That construction I deem to be forced and artificial, and not the legitimate interpretation of the statute, especially when I consider that there are various other subjects of property belonging to the United States, and belonging to them absolutely and conclusively, which from their variety could not well be specifically enumerated, and which, at some period or other, it might become convenient to the government and beneficial to the country to transport upon this road. But if, by any interpretation, the words "wagon or carriage laden

with the property of the United States," can be made to embrace stages carrying the mail, and employed purposely for that service, they surely cannot, by the most forced construction, be made to embrace stages laden with every thing else, by comparison, except the mail of the United States, and in which the mail was a mere pretext for the transportation of passengers and merchandize, or property of every description and to any amount, free of toll. They must at all events be laden with the mail. The term laden cannot be taken here as a mere expletive, nor should it be wrested from its natural import—be made identical in signification with the terms "carrying" or "transporting." Such a departure would again be a violation of common intendment, and should not be resorted to; and the abuses just shown, which such a departure would let in and protect, furnish another and most cogent reason why the common acceptation of the phrase, "property of the United States," should be adhered to. Fairness and equality with respect to all carriers and travellers upon this road and justice to the state which has undertaken to keep it in repair from the tolls collectible upon it, require this adherence.

If the interpretation here given of the act of 1831 be correct, then admitting that act to be a compact between Pennsylvania and the United States, the former has, by the 1st section of the act of 1836, infracted no stipulation in that compact. Pennsylvania never did, according to my understanding of her law of 1831, agree to the exemption from tolls for stages, wagons, or vehicles of any kind, intended for carrying the mails of the United States. These stood upon the like footing with other carriages. If this be true, then by the act of 1836, in which she has subjected to half-tolls only, stages, wagons, &c., carrying the mails, and at the same time transporting passengers or goods, so far from violating her compact, or inflicting a wrong upon the government or upon mail contractors, that state has extended to them a privilege and an advantage which, under the 3d proviso of the act of 1831, they did not possess. My opinion is, that the plaintiff in the court below had an undoubted right of recovery.

*LESSEE OF ANGELICA CROGHAN ET AL., PLAINTIFF, v. JOHN NELSON, DEFENDANT.

In making an entry of land, where mistakes occur which are occasioned by the impracticability of ascertaining the relative positions of the objects called for, the court will correct those mistakes so as to carry out the intentions of the locator.

THIS case came up on a certificate of division in opinion between the judges of the court below. It was an ejectment brought in the Circuit Court of the United States for the district of Kentucky.

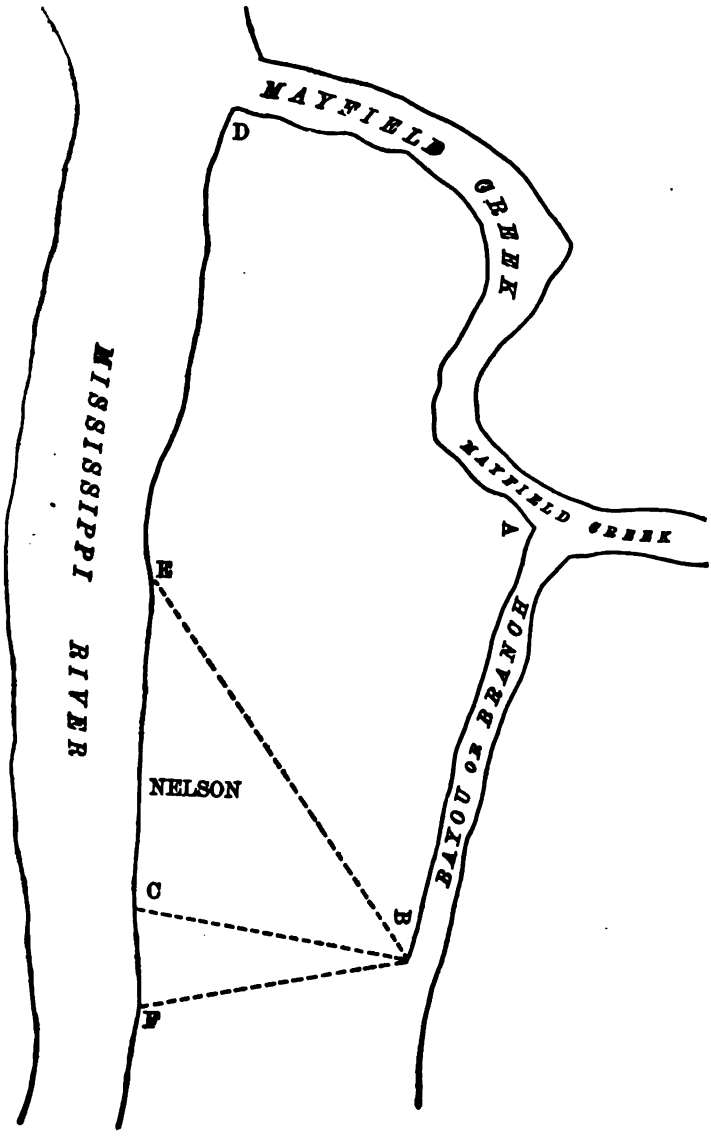
The case was this:

On the 16th of August, 1784, William Croghan, under whom the plaintiff claimed title, made the following entry: "William Croghan, assignee, enters 1000 acres of land, part of a military warrant, No. 2023, beginning at a fork of Mayfield creek, about two miles by water above Fort Jefferson, where a branch, occasioned by the high waters from the Mississippi, runs out of said creek, and at high water empties into the river at the upper end of the iron banks; from said beginning 500 poles, when reduced to a straight line; and then off from the branch towards [the] Mississippi on a line parallel to Mayfield creek, until a line from the extremity of said line, parallel with the first line, will strike Mayfield creek, to include the quantity."

On the 29th of November, 1826, a patent was issued to Croghan by the governor of Kentucky, which described the land as follows: "Beginning at a fork of Mayfield creek, occasioned by high water from the Mississippi river, and which creek or bayou empties into the Mississippi at the upper end of the iron banks, on a walnut, sweet gum, and ash standing on the west bank of the creek; running thence down the bayou or branch aforesaid with the meanders thereof, S. 18° W. 134 poles, S. 36° W. 200 poles, S. 48° W. 72 poles, S. 18° W. 14 poles, S. 18° W. 54 poles, S. 30° W. 120 poles; thence S. 110 poles, to two ash trees, a hackberry, and red bud on the west bank of the bayou; thence N. 75° W. 206 poles, to an elm, a sycamore, and box elder on the bank of the Mississippi river; thence up the same, with its meanders, and binding on it at low water-mark, N., &c., &c., to a walnut and two cotton wood trees at the mouth of Mayfield creek; thence up the creek, with the several meanders thereof, and binding on the same at low water-mark, &c., &c., to the beginning."

In 1830, Nelson took out a patent for the fractional northwest quarter of section 32, &c., containing 103 acres.

The whole dispute being one of location, it is impossible to understand the opinion of the court without a map or diagram.



*A, B, C, D, is the survey made for Croghan. A being the beginning station, and D the mouth of May- [*188
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field creek. The defendant contended that the plaintiff's line
*189] should run from B to E, and from E to D, in which case it is manifest that it would not include *the land granted to Nelson, the line B E being parallel to a line drawn from A to D.

Upon the trial, the counsel for the defendants asked the court to instruct the jury, that "if they believed from the evidence that the course of Mayfield creek, from A to D, is correctly laid down, then the line from B towards the Mississippi river should be run parallel to that to conform to the entry; and if, in running that parallel line, they shall believe from the evidence that the improvement of the defendants is left out, they ought to find for the defendants. But the court were divided in opinion on the point, whether the second line called for in the entry should run from B to E, or whether the line from B to C should be taken, and recognised as the true and proper line, it being the line on which the patent was founded. One judge being of opinion, that for all the land south and west of a line from B to E the patent was void, and the other judge being of a contrary opinion.

Upon this point, the case came up.

It was argued by Mr. *Underwood* for Croghan's heirs, who contended that the entry was "precise enough for others to locate other warrants with certainty on the adjacent residuum," as required by the act of 1779. The fork of the creek being found, it would be easy for a subsequent locator to run the line to B. Arrived there, and desiring to locate the "adjacent residuum" below, I think he has the means of knowing and ascertaining "*precisely*" the course which Croghan's line from B towards the Mississippi must pursue, and the distance in that direction.

Entries for land are addressed to the common good sense of those engaged in appropriating the vacant domain, and are to be "special and precise," so that subsequent locators shall not be deceived or deluded to their injury.

An entry is to be understood and taken as it would have been understood on the day it was made. See 1 Bibb. (Ky.), 35, 84; 2 Id., 105; Hard. (Ky.), 287.

Rectangular figure is not to be departed from without a strong indication of a contrary intent. 2 Bibb. (Ky.), 120; see also cases referred to under the 29th rule, in the index to 3 Bibb. (Ky.), under the head *Entries*.

A locator is not bound to give the best possible description, but it should be certain to a common intent, and not misleading. 2 Bibb. (Ky.), 144; 1 Id., 73, 64.

With these rules in the mind of a subsequent locator, wishing to ascertain the exact position of Croghan's 1000 acres, and with the entry before him, let us examine how he would proceed and reason upon the subject. He could not know the exact position of the lines without making a survey of the entry; but that is equally true in respect to every entry, no matter how special. He would know *that the [*190 natural objects called for were to constitute boundaries of the survey, when made. Thus, a subsequent locator would know, by inspecting the entry, that the branch down towards the iron banks from the fork of the creek at A, upon the plat, to a point 500 poles, when reduced to a straight line, from the beginning, constituted part of the boundary. He would also know that Mayfield creek, from the fork at A down towards its mouth, constituted another portion of the boundary. With this knowledge, he would find no difficulty in locating the adjacent residuum, lying eastwardly of the branch and the creek, without interfering with Croghan's entry. Conceding that a subsequent locator would be ignorant of the true course of the line from B upon the plat towards the Mississippi river, until a survey was actually made, still, if he desired to enter the land west of the branch below Croghan's entry, and adjoining Croghan's tract, he could have done so with perfect safety by calling to adjoin Croghan, without giving the course. If a subsequent locator wished to enter land below the mouth of Mayfield creek, lying between the river and Croghan's entry, supposing there might be land thus situated not covered by Croghan's entry, he would find no difficulty in making such an entry without interfering with Croghan, by calling to bind on Croghan and the river. Thus it is manifest, that the "adjacent residuum," in the language of the act of 1779, all around Croghan's entry, might have been appropriated by a subsequent locator, without interfering with Croghan's entry. I therefore insist, it is "certain to a common intent, and not misleading," in the judicial language of the Appellate Court of Kentucky. A better description than that given will therefore not be required.

Mr. *Underwood* then proceeded to argue, that the line from B should run, not parallel with that part of the creek between A and the mouth of it, but parallel with the general course of the stream, including the part above A, because this would include only 835 acres, and the locator's intention was to enter 1000.

He then referred to a number of Kentucky cases to show, that the intention of the locator must be carried out, &c., &c.

Mr. Justice McKINLEY delivered the opinion of the court.

This is a case certified to this court from the Circuit Court for the district of Kentucky.

The plaintiffs brought an action of ejectment, in that court, against the defendants; and to support their action, they read to the jury a patent for 1000 acres of land, granted by the state of Kentucky to Charles Croghan, bearing date the 29th of November, 1826, and proved title in themselves by the will of the said Charles Croghan. The plat marked A was shown to the jury; and the surveyor proved, that the fork of Mayfield creek, at the letter A, was correctly laid down; that five hundred poles, on a straight line, on the branch leading from *191] Mayfield creek, would extend the line to letter B, on *the plat, where one of the patent-corners was found; and that the plat truly represented the land granted by the patent.

The defendant then read the following entry of William Croghan, assignee, for 1000 acres, dated 16th of August, 1784, on which the patent is founded, to wit: "William Croghan, assignee, enters 1000 acres of land, part of a military warrant, No. 2023, beginning at a fork of Mayfield creek, about two miles by water above Fort Jefferson, where a branch, occasioned by the high waters from the Mississippi, runs out of said creek, and at high water empties into the river at the upper end of the iron-banks; from said beginning 500 poles, when reduced to a straight line; and then off from the branch towards the Mississippi, on a line parallel to Mayfield creek, until a line from the extremity of said line, parallel with the first line, will strike Mayfield creek, to include the quantity." The defendants then offered in evidence a patent from the state of Kentucky to Hugh Nelson, for 103 acres of land, bearing date the 17th of December, 1830; and proved by the surveyor, that the beginning of the entry was at A, on the plat, and that the end of the first line was at B, and if a line were run from B towards the Mississippi river, in a direction parallel with the general course of Mayfield creek, for twelve miles above the fork at A, it would be the red line extending from the letter B to the Mississippi river at F. It was also proved, if a line were run from the corner at B parallel with Mayfield creek, below the fork, to the letter D, at the mouth of the creek, it would run from B to E, and leave out the land claimed by the defendants. The surveyor also proved, that the various lines on the plat were correctly laid down from actual survey.

"The counsel for the defendants then prayed the court to instruct the jury, if they believe, from the evidence, that the

course of Mayfield creek from A to D is correctly laid down, then a line from B towards the Mississippi river should be run parallel to that line, to conform to the entry; and if, in running that parallel line, they shall believe, from the evidence, that the improvement of the defendants is left out, they ought to find for the defendants. But the court were divided in opinion on the point, whether the second line called for in the entry should run from B to E, or, whether the line from B to C should be taken and recognized as the true and proper line, it being the line on which the patent was founded. One of the judges being of the opinion, that for all the land south and west of a line from B to E the patent was void; and the other judge being of a contrary opinion. They were also divided in opinion, for the foregoing reasons, whether the foregoing instructions ought to be given or refused."

By a statute of Kentucky, passed the 26th of December, 1820, it is required, that all surveys thereafter to be made on entries west of Tennessee river should be run according to the calls of the entry. And "to enable the register to ascertain whether the survey is made according to entry, a copy of the entry shall be returned to the register's *office, [*192 with the plat and certificate of survey; and any patent issuing on a survey made contrary to the location shall be void to all intents and purposes, so far as the same may be different and variant from the location." The survey in this case was made on the 5th day of November, 1825; and the patent under which the defendants claim, dated the 17th day of December, 1830, was granted for land sold by the state subsequent to the date of the patent under which the plaintiffs claim title, and which covers part of the land claimed by the defendants. This brings in question the legality of the survey, and the construction of the entry on which it was made, and leads to an examination of the points certified for our determination.

But before we enter on that duty it will be proper to consider the circumstances in which the locator was placed when he made the entry. It was proved in the Circuit Court, that along this branch there was a very dense cane-brake, and the greater part of the land covered by the patent is still a dense cane-brake. It was also proved, that a line run parallel with the general course of Mayfield creek, for twelve miles above the fork, and crossing the branch, at the termination of the 500 poles, from A to B, on the plat, would strike the Mississippi river at F, on the plat, a considerable distance below the corner called for in the patent at the letter C. And it appears by the plat that the creek continues to run nearly the same course for 300 or 400 yards below the fork, and then runs

north of northwest for about 800 poles. Now we have a right to infer, from the facts proved, that all the land included in Croghan's patent, and all the river bottom above Mayfield creek, at the date of the entry, was a dense cane-brake; because, if an object, permanent in its nature, is proved to exist at the time of the trial, it is fair to infer that it existed at the time the entry was made. *Crochet* v. *Greenup*, 4 Bibb (Ky.), 158. The history and topography of the great valley of the Mississippi proves satisfactorily, that where there is a cane-brake now there was one sixty years ago; and this fairly induces the belief that the cane upon the rich and alluvion lands is coeval with the oldest trees of the forest. As the locator had the means of ascertaining the course of Mayfield creek above the fork, where it ran across the high lands, and where there was no cane, it is reasonable to suppose, from the calls of the entry, that he believed that Mayfield creek, below the fork, ran nearly at right angles to the branch in its general course to the river. And he had a right, from the circumstances, also to believe, that the distance from the fork of the creek to the river was about two miles, when in fact it was less than one mile.

It is obvious from these circumstances, and the calls of the entry, that the locator believed the survey to be made upon it would approach as near to a parallelogram as the irregularity of the two natural boundaries would permit. We are
*193] led to the conclusion, *therefore, that these mistakes were all occasioned by the impracticability of ascertaining the relative positions of the objects called for, and the courses and distances of the lines necessary to include the quantity of land specified in the entry. But mistakes of this character have been corrected, as far as practicable, by the courts of Kentucky, in giving construction to entries, and particularly in two recent cases like this between military claims and purchases from the state. *Rays* v. *Woods*, and *Daniel, &c.* v. *Allison*, 2 B. Mon. (Ky.), 224. Keeping these mistakes in view, we will proceed to give construction to the entry. The call to run from the termination of the base line at B, 500 poles from the fork of the creek at A, and off from the branch towards the Mississippi on a line parallel to Mayfield creek, until a line from the extremity of said line, parallel with the first line, will strike Mayfield creek; to include the quantity, presupposes that a line from the termination of the base line on the branch, parallel with Mayfield creek, to include the quantity, would terminate before it reached the river, otherwise the locator would have called to run to the river. But it was found, when they made the survey, that the whole area,

bounded by the branch, from the termination of the 500 poles, Mayfield creek to its mouth, and the Mississippi river, down to the letter E, the point where a line running from the termination of the base line, parallel to Mayfield creek, strikes the river, would include but 887 acres, and when reduced to straight lines, would present a rhomboidal figure, with two extremely acute, and two extremely obtuse angles, instead of the figure which must have been in the mind of the locator when he made the entry. We might, therefore, upon the authority of the cases referred to in 2 B. Mon., sustain the survey on the ground of the mistakes of the locator, evidently made under the influence of causes well calculated to mislead him. But there are other reasons and other authorities upon which this entry and survey may be sustained. It is a well settled rule of construction, that where there are calls in an entry repugnant to each other, those which are inconsistent with the main intention of the locator, manifested by the words of the entry, shall be rejected to give effect to the entry. For example, distance shall prevail over course, where it appears by other calls in the entry the course has been mistaken. *Smith* v. *Harrow and others*, 1 Bibb (Ky.), 104. A call to include a natural object will prevail over a mistaken distance called for to reach the object. *Preeble* v. *Vanhoozer*, 2 Bibb (Ky.), 118; *McIver* v. *Walker and another*, 9 Cranch, 173. Testing the entry by these rules, has it been properly surveyed?

Three of the lines are natural and permanent boundaries, except the line on the river, which may be extended in length; the fourth is artificial and movable. It has been already shown that a line from the termination of the line on the branch, at B, to the river at E, and thence up the river to the mouth of Mayfield creek, will not *include the quantity of land called for in the entry. If it is practicable, by a reasonable construction of the entry, to give the whole quantity of land called for, it is the duty of the court to give such construction. The mistakes referred to have defeated the intentions of the locator, no doubt, as to the figure of the survey; but, like all prudent locators, he provided, as far as he could, against the influence of such mistakes, by requiring that the two last lines of the survey should be so run as to include the quantity of land called for in the entry. To these two lines he gave course, but gave no specific distance to either, that they might be run long enough to include the quantity. The first of these lines was to run from the termination of the base line at B, "off from the branch towards the Mississippi, on a line parallel to Mayfield creek," but no [*194

specific distance is given, nor is any natural object called for as the termination of this line. Its termination was to be governed, therefore, by the relative positions of the objects previously called for, and the actual distance of the line, on the branch, from the river, and by the necessary course and distance that the first and second of these two lines should run to include the quantity; and therefore he continues the call by saying, "until a line parallel to the first (the base line) will strike Mayfield creek, to include the quantity." The word "until," in grammatical construction, modifies and qualifies the words used to give course and distance, and, in legal construction, the call for course must yield to the call for quantity, the latter being the most important call in the entry.

The great and leading object of every entry is to obtain the quantity of land specified in it; every other call, therefore, must be regarded as intended to effect this principal object, and as subordinate thereto. The call, to run a line parallel with the first, or base line, is, therefore, repugnant to the call to include the quantity, and must be rejected. Because, if this line had been run parallel with the base line, the quantity of land would not have been included. And for the same reason the words "on a line parallel to Mayfield creek" must be rejected, they being, also, repugnant to the call to include the quantity. The survey, has, therefore, in our opinion, been made in conformity with the entry, by running from the mouth of Mayfield creek, down the river, to the corner at C, that being the distance required to include the quantity; and the line from B, another corner, has been properly run to C, that being the course and distance necessary to close the survey and to include the quantity of land called for in the entry. It is the opinion of this court, therefore, that the Circuit Court ought to have refused the instruction prayed for by the defendant's counsel.

It is ordered, that it be certified to the Circuit Court, that the line from B to C "should be taken and recognised as the true and proper line," and that the instructions prayed by the defendant's counsel ought to be refused.

*195] *Mr. Justice McLEAN.

"Croghan, assignee, enters 1000 acres of land, part of a military warrant, No. 2023, beginning at a fork of Mayfield creek, about two miles by water above Fort Jefferson, where a branch occasioned by the high waters of the Mississippi runs out of said creek, and at high water empties into the river, at the upper end of the iron-banks; from said beginning, 500 poles when reduced to a straight line, and then off from the

branch towards the Mississippi, on a line parallel to Mayfield creek, until a line from the extremity of said line, parallel with the first line, will strike Mayfield creek to include the quantity."

By a statute of Kentucky passed in 1820, all entries on military warrants west of the Tennessee river are required to be surveyed agreeably to their calls; and any survey and patent which shall cover more land than the entry calls for, is declared to be void as to such surplus. There can be no objection to the validity of this law, as it impairs no right.

Under this statute, the court were requested to give a construction to the entry in question. The prayer was, that the court should instruct the jury, "if they believe from the evidence that the course of Mayfield creek, from A to D, (the letter A being at the fork of the creek, the beginning of the entry, and the letter D at the mouth of the creek,) is correctly laid down, then the line from B (the termination of the first line of 500 poles) towards the Mississippi, should run parallel to that, or (in other words) to Mayfield creek, to conform to the entry."

The only dispute is as to the second line, which is "to run from the branch towards the Mississippi, on a line parallel to Mayfield creek." And this was the instruction prayed for, and which was rejected by the court. Had the instruction been in the very words of the entry, there would not have been a closer conformity with it.

The disputed line was called for by the entry "to run parallel to Mayfield creek." Now one line to be parallel to another must be equidistant from it. And that was what the instruction asked. From the words of the call in the entry, as to this line, the creek from the forks to the mouth must have been intended, as the line designated could only be parallel to that part of the creek.

The third line called for in the entry was to run from the termination of the line parallel to Mayfield creek, and "parallel with the first line, so as to strike Mayfield creek to include the quantity." As this line strikes the creek at the mouth, and runs on the bank of the Mississippi, it cannot be varied to include in the survey the thousand acres called for in the entry. There is a deficiency of one hundred and acres, which covers the land in controversy. And the question is, whether the second lines called for in the entry, to run parallel with Mayfield creek, can be disregarded, and extended *so as to include the lands of the defendants [*196 and the quantity called for in the entry.

In my opinion, this can no more be done than the beginning

called for in the entry can be changed, or the first line of the survey. The third line up the Mississippi was, by the entry, "to strike Mayfield creek so as to include the quantity."

It is admitted that Mayfield creek, with its meanders, forms the closing line of the survey. I know of no principle in the land law of Kentucky which authorizes a court to disregard the specific calls of an entry, so as to include the quantity designated. The locator was, no doubt, deceived as to the ground covered by his entry. The line called to be run so as to include the thousand acres being bounded by the Mississippi, could not be varied so as to answer the calls of the entry for quantity. This was the misfortune of the locator which is chargeable only to himself. It is clear that he cannot disregard the calls of the entry, on any other line, so as to include the quantity.

The injustice of such a construction to the defendants, seems to me to be clear. Finding the claim of Croghan's entry designating in plain terms its boundaries, and knowing that by the law he was limited to the calls of his entry, his survey not having been made, they purchased the adjacent residuum. And I have no doubt that, by the well established principles of the land law in Kentucky, their title is good; and, therefore, the instruction prayed for should be given.

In *Rays* v. *Daniels et al.*, 2 B. Monr. (Ky.), 222, the court say in reference to this district of country, where a patent has issued, the proof of a variance in the survey from the entry, so as to make the patent void, for the land not included in the entry, devolves on the adversary claimant. But they do not say, in that or in any other case, that where the locator is limited strictly to the calls of his entry, by a subsequent entry, or, as in the present case, by an express statute, that the call for quantity controls the specific calls of the entry. There is no principle better settled in the land law, than that the calls in a survey and patent are not affected by quantity. If no private and paramount right be interfered with, whether the survey and patent contain more or less than the quantity called for, it is equally valid. An entry cannot call for a greater number of acres than is authorized by the warrant on which it is made; but, where the boundaries called for are specific, and the locator is limited strictly to the boundaries of his entry, in making his survey, he can no more disregard them than he can disregard the boundaries called for in his patent.

Palpable mistakes in the entry, such as a call for east instead of west, which is apparent by other calls in the entry, may be corrected. But where there is no mistake or uncertainty in the calls, to vary them is to make a new entry. This, I con-

ceive, no court has *power to do. An entry, like every other instrument of writing, must be construed by the words used. And these words can never be extended, by construction, so as to infringe upon subsequent and *bonâ fide* entries.

JOHN TAYLOR, JUNIOR, AND WILLIAM BLACKBURNE & CO., CLAIMANTS OF CLOTHS AND KERSEYMERES, PLAINTIFFS IN ERROR, *v.* THE UNITED STATES, DEFENDANTS IN ERROR.

It is the right of an officer of the customs to seize goods which are suspected to have been introduced into the country in violation of the revenue laws, not only in his own district, but also in any other district than his own.[1]

And it is wholly immaterial who makes the seizure, or whether it was irregularly made or not, or whether the cause assigned originally for the seizure be that for which the condemnation takes place, provided the adjudication is for a sufficient cause.

In the trial of such a case the officers of the customs who made the seizure are competent witnesses.

A bill of lading, entry, and owner's oath concerning other goods than those seized, may be admitted as a link in the chain of evidence to show a privity between the parties to commit a fraud upon the revenue.

When a witness on the part of the United States stated, that his firm were importers of cloths, and was asked, upon a cross-examination, to state the extent of their importations, to which he answered, "formerly we imported large quantities of woolens; for three or four years past we have imported but a few packages annually," it was a proper question on the part of the United States, "whether there was any thing in the state of the market which caused the alteration?"

It was also a proper question, whether other goods than those seized were lying in the custom-house at New York, under circumstances from which the jury might infer a connivance between parties inconsistent with fair dealing?

An invoice of other goods entered at another port, but marked like those seized, was also properly admitted as strengthening the evidence of the true ownership of packages with this mark.[2]

To rebut the proof of a general usage of an allowance of five per cent. for measurement, other invoices were properly introduced in which there was no such allowance.

Where a witness was introduced to prove such usage, and had verified his own invoices, it was admissible to read a letter which had been addressed to the witness and was annexed to one of the invoices.

Revenue-laws, for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not, in a strict sense, penal acts, although they impose a penalty. But they ought to be so construed as most effectually to accomplish the intention of the legislature in passing them, instead of being construed with great strictness in favor of the defendant.[3]

[1] As to what makes a *prima facie* case, see *Ten cases of Opium*, Deady, 62, 64. As to burden of proof, see *The Brig Busy*, 2 Curt., 586, 587.

[2] APPLIED. *Fennerstein's Champagne*, 3 Wall., 148.

[3] FOLLOWED. *Smythe* v. *Fiske*, 23 Wall., 380; *Lewis* v. *Brainerd*, 53 Vt., 517. CITED. *United States* v. *Lucero*, 1 New Mex., 449.

"Acts declaring forfeitures and imposing penalties for violation of the

Concealment and under-valuation of goods are good grounds, amongst others, for a decision of the court, that probable cause of prosecution existed.
The 68th section of the act of 1799 reaches cases where, by a false and fraudulent under-valuation, less than the amount of duties required by law has been paid as well as those where no duties at all have been paid.[4]

THIS case came up by writ of error from the Circuit Court of the United States for the eastern district of Pennsylvania.

*198] *It was an information filed in the District Court of the United States for the eastern district of Pennsylvania against sundry cases and pieces of cloths and kerseymeres, seized on land, as forfeited. The information contained thirteen counts.

The first and second were founded on the 50th section of the act of 1799, chap. 128.

The third on the 68th section of same act.

The fourth and fifth on the 66th section of same act.

The sixth, seventh, and eighth on the 4th section of the act of 28th May, 1830, chap. 147.

The ninth on the 14th section of the act of 14th July, 1832, chap. 224.

The tenth on the same section as fourth and fifth.

The eleventh and twelfth on the same section as sixth, seventh, and eighth.

The thirteenth on the same section as ninth.

Upon the first and second counts the jury found a verdict for the claimants, and upon the remaining counts for the United States. The claimants were John Taylor, jun., and William Blackburne & Co.

The claims filed were as follows:

"John Taylor, jun., late of the city of New York, but now absent from the United States, by Edward Henry Bradbury, his attorney in fact, comes and claims the said goods, wares, and merchandise, in the said information and libel mentioned as his property; (subject to the repayment of a certain advance or loan of sixty thousand dollars and upwards, thereon made to him by William Blackburne & Co.;) and the said John

revenue laws must be construed so as to accomplish the object for which they are intended. In the technical sense, they are not penal, but rather remedial—intending to effect a public good and prevent frauds." *Ten cases of Opium*, Deady, 62, 70. See *United States* v. *Athens Armory*, 2 Abb. (U. S.), 129, 137; *The Steamer Missouri*, 8 Ben., 508, 510; *United States* v. *Willetts*, 5 Id., 220, 227; *United States* v. 36 *Barrels of High Wines*, 7 Blatchf., 459, 463; *United States* v. *Mynderse*, Id., 483, 489; 250 *Barrels of Molasses* v. *United States*, Chase Dec., 502, 511; *United States* v. 26 *Bales of Rubber Boots*, 3 Ware, 205, 210; *United States* v. 12,347 *Bags of Sugar*, 1 Abb. (U. S.), 407, 421, 423; *United States* v. 100 *Barrels of Spirits*, Id., 305, 315.

[4] See also *Clifton* v. *United States*, 4 How., 250; *United States* v. *Sixty-seven Packages, &c.*, 17 How., 93, 94.

Taylor, jun., by his said attorney, alleges, that at the time of the seizure aforesaid he was, and yet is the true and lawful owner of the said goods [wares] and merchandise, subject as aforesaid. JOHN TAYLOR, Jun.,

"*October* 10*th*, 1839. *Pr. pro* E. H. BRADBURY.

"Edward Henry Bradbury, being duly sworn, says, the facts above set forth are just and true, to the best of my knowledge and belief. I am the duly authorized attorney in fact of the above named John Taylor, jun. He was absent from the United States at the time the seizure of the above mentioned goods, wares, and merchandise was made, and has ever since continued, and still is absent from the United States.

"E. H. BRADBURY.

"Sworn, October 11th, 1839, before me.

"PTR. CHRISTIAN, Alderman.

"William Blackburne & Co. claim the said goods, wares, and merchandise, in the said libel and information mentioned, as the sole property of them, the said William Blackburne & Co., for the purpose of securing and paying an advance or loan thereon made by them to John Taylor, jun., of sixty thousand dollars and upwards; *for securing which said [*199 loan or advance the said goods [wares] and merchandise were delivered to them, long before the said seizure, by the said John Taylor, jun., in whose possession they were as his property, and remained in their possession as aforesaid at the time of said seizure, without any notice or knowledge on their part that there was any allegation whatever, that the same had not been duly imported, and the duties paid or secured; or, that the same were on any account liable to seizure, and under the full and entire belief, on their part, that the said goods [wares] and merchandise had been duly imported and entered, and the duties thereon paid or secured according to law.

"*October* 10*th*, 1839. WM. BLACKBURNE & Co.

"Francis Blackburne, being duly sworn, says, I am a member of the firm of William Blackburne & Co., mentioned in the foregoing claim. The facts stated in the foregoing claim are just and true, to the best of my knowledge and belief. The said firm of William Blackburne & Co., at and before the time of the seizure of the goods and merchandise mentioned in the said information and libel, was composed of William Blackburne, Francis Blackburne, Christopher John Blackburne, and Charles F. Shaw; since that time the said Charles

F. Shaw has retired from said firm and is no longer a member thereof. FRS. BLACKBURNE.

"Sworn, October 11th, 1839, before me.

"PTR. CHRISTIAN, Alderman.

"And now, , comes John Taylor, jun., and, by leave of the court first had, withdraws so much only of his claim heretofore filed in this case as relates to forty-three pieces of cloths, part of the goods above mentioned, and on behalf of James Buckley, claims twenty-nine pieces of cloth, part of said forty-three pieces, as the property of the said James Buckley, and on behalf of John W. Bradbury, claims fourteen pieces of cloths, the residue of the said forty-three pieces, as the property of the said John W. Bradbury; and the said John Taylor, jun., says, that the said Buckley and Bradbury are respectively the true, sole, and lawful owners of the respective parcels of cloth herein above claimed for them respectively, and, so being the owners, respectively consigned the said several parcels to the said John Taylor, jun., who, as their consignee and factor, at the time of the seizure aforesaid, held, and is still entitled to hold the same, subject to the repayment of the advances made thereon by William Blackburne & Co., in whose actual possession they then were. And the said John Taylor, jun., further says, that the said Buckley and Bradbury are both resident in England, and were, at and before the time of said seizure, and now are, absent from the United States. "JOHN TAYLOR, Jun.

*200] *"John Taylor, jun., being duly sworn, says, that the facts above set forth are true to the best of his belief.

"JOHN TAYLOR, Jun.

"Sworn and subscribed before me, February 12th, 1840.

"WILLIAM MILNOR, Alderman."

In March, 1840, the case came on for trial. Some of the points of law which were raised are thus stated in the record: And the counsel of the said plaintiffs, to support and prove the issue on their part, called as witnesses John J. Logue, George Gideon, and William Cairns, who, being respectively sworn on their *voir dire*, testified that they went to Blackburne's store, and there assisted in making the seizure of the goods mentioned in the said information; the said Logue and Gideon stating that they were, at the time of making said seizure, inspectors of the customs in the district of Philadelphia, and the said Cairns stating that he was, at the time of making said seizure, an inspector of the customs in the port of New York. Whereupon, the said defendants objected to the

admission of said Logue, Gideon, and Cairns, severally, as witnesses for the plaintiffs, they being interested in the event of the case. But the judge overruled the said objections and admitted the said witnesses, to which admission the defendants then and there excepted; and the said Logue, Gideon, and Cairns, were thereupon severally sworn and examined on behalf of the plaintiffs, and proved the facts attending the seizure of the goods, and that certain original marks on packages containing the said goods had been erased, and among them the mark [B]F, which was originally upon one of said packages.

In the course of the examination of the said witnesses, the following papers were produced and given in evidence, being the affidavit, warrant, and authority under which the seizure of the said goods was made, viz.: A list of the goods seized, affidavit of William Cairns, warrant of Alderman Milnor, authority from George Wolf, esq. collector of the port of Philadelphia. It was also proved that the greater part of said goods were seized in an apartment in the second story of the house No. 26 Church alley, adjoining the house No. 24 Church alley, which apartment was occupied by the house No. 24 Church alley, into which a doorway had been cut, the communication between said apartment and the remainder of the house No. 26 Church alley being closed.

The counsel of the United States, further to prove the issue on their part, offered in evidence the bill of lading, entry, and owner's oath, taken on the 16th of July, 1839, in the month preceding the seizure of the goods in question, of nineteen cases of goods, (not part of the goods seized,) marked [B]F 1 *a* 19. To all which the said defendants objected; but the judge overruled the objection, and admitted the same in evidence. Whereupon the said papers were read in evidence.

[The counsel of the United States, further to prove the issue on *their parts, offered evidence to prove that [*201 William Blackburne & Co. had, in January, 1839, imported certain invoices (no part of the goods seized) into Philadelphia, and had entered them at the custom-house there; that the goods so imported had been appraised above the invoice prices; that the importers had acquiesced in such appraisement; and that Francis Blackburne thereupon stated that he had passed 140 cases at New York at similar prices, and would cease importing goods here; the counsel stating that this was to be followed by evidence to show that he never did import into New York in his own name. All which evidence was objected to by the defendants, but was admitted by the court, to which the defendants then and there excepted; and the

said evidence was thereupon given. And the plaintiffs further proved the admission of the defendant Taylor, that the said mark [B]F was the mark of said defendant Francis Blackburne, and that said Taylor, as the agent of said Blackburne, had paid freight at New York for packages of goods imported there with that mark; and further proved that no importations had been made at that port in the name of said Francis Blackburne, or of said William Blackburne & Co., previously to the summer of 1839, but that large importations had been made there in the name of the claimant, John Taylor, jr. It was proved that the goods seized had been imported into New York, and entered and passed there, and the duties thereupon paid, but it was no part of the evidence or case of the United States, that there had been any fraud or connivance on the part of the officers of the custom-house of New York with the importers of said goods.]

Abraham I. Lewis was examined as a witness on behalf of the United States; and having stated that his firm were importers of cloths and kerseymeres, and that he had thereby a knowledge of their quality and value, he was asked, on cross-examination, to state the extent of the importations of his firm; and in reply, said: "Formerly, we imported large quantities of woollens; for three, four, or five years past, we have imported but a few packages annually." Whereupon the counsel of the United States, on re-examination, proposed the following question, viz.; "Was there any thing in the state of the market which caused the alteration which you have mentioned, in the amount imported by you within four or five years last past?" To which question the defendants objected. But the judge allowed the question to be put, saying, the question may have a bearing on the case, &c.; that it was but following out the question on the cross-examination. To which decision the defendants then and there excepted. Whereupon the said question was put to the witness, and answered by him.

The counsel of the United States further offered to prove, by the oath of David Gardiner, that certain goods marked [B]F, which had been imported into New York in the ship
*202] Eutaw, being the same on which defendant Francis Blackburne was alleged to have *paid the freight as aforesaid, were still in the custom-house at New York. To which the defendants objected. But the judge overruled the objection, and admitted the evidence; to which decision the defendants then and there excepted. Whereupon the said evidence was given.

The counsel of the United States further offered in evidence

an invoice of merinos (not part of the goods mentioned in the information) bought of Abel Shaw, entered in Philadelphia by William Blackburne & Co., by ship Franklin, on the 19th August, 1839, marked [B]F, 85 *a* 53, offered as strengthening the evidence of the ownership of packages with this mark. To which the defendants objected. But the judge admitted the evidence; to which decision the defendants then and there excepted. Whereupon the said invoice was read in evidence.

And the counsel of the United States, in rebutter, offered in evidence invoices of Blackburne, Taylor, and Okie & Robinson, to show the absence of any such custom as to the allowance of five p. c. for measurement, as had been testified to by the witnesses on the part of the defendants. Which evidence was objected to by the defendants. But the objection was overruled by the court, and the said evidence was admitted; to which decision the defendants then and there excepted. Whereupon said invoices were read.

The defendants produced and examined John Robinson, of the firm of Okie & Robinson, and Robert Walker, to prove an alleged usage of trade, in England, to make a discount or allowance of five per cent. for measure on cloths and cassimeres; said Robert Walker being cross-examined, several invoices of his own importations into the port of New York were shown to and verified by him: and the said invoices were placed by plaintiffs' counsel in the hands of the counsel of the defendants, and one of said invoices was read by the counsel of the United States to the jury. The counsel of the United States, pending this cross-examination, offered to read to the jury a letter from one Waite to the witness, which accompanied and was annexed to one of the said invoices, and left therewith in the New York custom-house, on which the goods had been entered, and referring to the said invoice. The reading of which letter in evidence was objected to by defendants. But the court admitted the same to be read to the jury; to which decision the defendants' counsel excepted. Whereupon the said letter was read in evidence.

And the counsel of the United States further offered in evidence the several invoices which had been shown to defendants' witness, Robert Walker, during his cross-examination, and had been verified by him, of goods consigned to and imported by said Robert Walker into New York; the said invoices having been shown to the counsel for the claimants, and one of them read to the court and jury, without objection on the part of the claimant to any of them, which [*203
*being objected to by defendants, the judge said that

he considered them to be already in evidence, inasmuch as one had been read to the jury, and the others shown to the witness Walker, verified by him, and shown to the counsel of the defendants, and all were offered for the same purpose, and that the papers should be considered in evidence. To which decision the defendants then and there excepted. Whereupon the said invoices were read to the jury.

And the judge charged the jury.

And thereupon the defendants' counsel excepted to the said charge generally, and to every part thereof; and in addition to said general exception, and without prejudice thereto, specified the following exceptions, to wit:

That the judge, in his said charge, instructed the jury—

1. That the whole proceeding in the seizure of the goods in question was, and substantially, in conformity with the act of Congress.

2. That the objections made to the proceedings are immaterial to the issue now trying.

3. That the entry of the goods at New York, their appraisement at the custom-house there, the payment of the duties according to that appraisement, and the delivery of the goods thereupon to the importers, were not conclusive against the United States in this case.

4. That the revenue acts mentioned in this information are not strictly penal laws.

5. That the duties on the goods were not paid within the meaning of the 68th section of the act of 1799, (although they had been passed at the custom-house of New York, and the duties there assessed upon them had been paid, according to the value and prices in the invoice,) if the jury should be of opinion that they were not invoiced at their fair and true cost and value.

6. That the provision of the 66th section of the act of 1799, mentioned in the charge, was not repealed.

7. That under the act of 1830, when a package or invoice has been made up with intention to defraud, the package or invoice (that is, the goods contained in the invoice) are forfeited.

8. That the probable cause mentioned in the 7th section of the act of 1799, is not a cause existing and known to the persons by whom the seizure was made, antecedent to the seizure, and which was the warrant and ground of the proceedings. The probable cause intended by the act has no reference to the seizure, but to the trial. There must be probable cause for the prosecution, not for the seizure, and the court is to judge

of it by what appears to the court—by what comes to the knowledge of the court on the trial of the prosecution.

9. That the United States have shown probable cause for the *prosecution, and that the *onus probandi* was thrown upon the claimants. [*204

10. That it was not necessary to affirm or deny the doctrine that there can be but one official appraisement of the goods, and that that must be made in the custom-house at which the goods were entered.

11. That the first step in the inquiry whether the goods are invoiced at their actual cost, is to ascertain what was their actual cost; and how has this been done on the part of the United States? By certain appraisements made, in the first place, by official appraisers of the custom-house of this city; and further, by private appraisers, selected for that purpose. If the opinions of Messrs. Stewart and Simpson (the official appraisers at the port of Philadelphia) have not the authority of an official appraisement or act, they have, nevertheless, the weight of the judgment of men accustomed to other goods of this description, and who, from the appointment, as well as their experience, may be presumed to have competent knowledge and skill in ascertaining their value. In this light the jury may consider their evidence, and give credit to it accordingly.

And thereupon, the counsel for the said claimants did then and there except to the aforesaid charge and opinions of the said court; and inasmuch as the said charge and opinions, so excepted to, do not appear upon the record, the said counsel for the said claimants did then and there tender this bill of exceptions to the opinion of the said court, and requested the seal of the said judge aforesaid should be put to the same, according to the form of the statute in such case made and provided.

And thereupon, the aforesaid judge, at the request of the said counsel for the claimants, did put his seal to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided. JOS. HOPKINSON. [L. S.]

Meredith and *Crittenden*, for the plaintiffs in error.

Cadwallader and *Nelson*, attorney-general, for the United States.

[The Reporter was unavoidably absent, and therefore cannot report the arguments of the respective counsel.]

Mr. Justice STORY delivered the opinion of the court.

This is a writ of error to the judgment of the Circuit Court

of the eastern district of Pennsylvania, affirming the judgment of the District Court founded upon an information *in rem* against certain cases of cloths and cassimeres seized on land in the said district. The cause was tried by a jury, who returned a verdict for the United States, upon which the judgment was rendered.

The information contained thirteen counts. The first and second counts were founded on the 50th section of the Duty-Collection Act of 1799, chap. 128; the third count was *205] founded on the 68th section *of the same act; the fourth, fifth, and tenth counts were founded on the 66th section of the same act; the sixth, seventh, eighth, eleventh, and twelfth counts were founded on the 4th section of the act of the 28th of May, 1830, chap. 147; and the ninth and thirteenth counts were founded on the 14th section of the act of the 14th of July, 1832, chap. 224. The claimants put in a plea or answer denying the allegations in the information, upon which an issue was tendered and joined, and tried by the jury.

At the trial, certain exceptions were taken to the matters ruled, and to the charge given by the learned judge who presided at the trial, the form and frame of which exceptions, as propounded by the counsel, we do not propose to examine; and the questions submitted to us arise from the matters of law thus ruled and contained in his charge. With the comments of the learned judge upon the evidence, except so far as they involved matters of law, we have nothing to do, as they were submitted solely for the consideration of the jury in weighing the evidence, of which they were the proper and final judges.

In the course of the argument in this court, an objection was insisted on, that the seizure itself upon which the information is founded, was irregularly and improperly made, it having been made by the collector of the customs of the port of Philadelphia, when it should have been made by the collector of the customs of the port of New York. And some reliance in support of this objection seems to have been placed upon the supposed intention of the 68th section of the Duty-Collection Act of 1799, chap. 128. But if any reliance could be placed thereon, (as we think it could not,) it would be completely removed by the 70th section of the same act, which makes it the duty of the several officers of the customs to make seizure of all vessels and goods liable to seizure by virtue of that act or any other act respecting the revenue, as well without as within their respective districts. So that it is plain from this provision

that a seizure made by any officer of the customs of any district would be good, although made within any other district. And the whole structure of the act shows that any officer of the customs had a perfect right to seize goods found in his own district, and indeed that it was his appropriate duty.

But the objection itself has no just foundation in law. At the common law any person may, at his peril, seize for a forfeiture to the government, and, if the government adopts his seizure, and institutes proceedings to enforce the forfeiture, and the property is condemned, he will be completely justified. So that it is wholly immaterial in such a case who makes the seizure, or whether it is irregularly made or not, or whether the cause assigned originally for the seizure be that for which the condemnation takes place, provided the adjudication is for a sufficient cause. This doctrine was fully recognized [*206 by this court in *Hoyt* v. *Gelston*, 3 Wheat., 247, *310, and in *Wood* v. *United States*, 16 Pet., 342, 358, 359. And from these decisions we feel not the slightest inclination to depart.

Indeed, if the objection could under any circumstances be maintainable, it was matter that should have been propounded as preliminary matter in the nature of a plea in abatement of the information, and could constitute no point before the jury upon pleadings addressed to the merits of the case, and involving the direct question of forfeiture or not.

In the course of the trial several objections to the competency of certain witnesses, and to the admissibility of certain evidence, offered on behalf of the United States, were taken by the claimants. In the first place an objection was taken to the competency of John J. Logue, George Gideon, and William Cairns, called to support the issue on behalf of the United States, they being officers of the customs and the persons who made the seizure of the goods in controversy. By the 71st section of the Duty-Collection Act of 1799, chap. 128, the *onus probandi* to establish the innocence of the property is thrown upon the claimant in all cases where probable cause is shown for the seizure and prosecution. And by the 89th section of the same act it is provided, that when in any prosecution on account of a seizure judgment shall be given for the claimant, if it shall appear to the court before whom such prosecution shall be tried, that there was a reasonable cause of seizure, the court shall cause a certificate and entry to be made thereof; and in such case the person making the seizure, or the prosecutor, shall not be liable to any action, suit, or judgment, on account of such seizure and prosecution. The argument, therefore, on behalf of the claimant is, that these

witnesses are incompetent, they being interested in the event of the suit, and being liable to an action at the suit of the claimants, if reasonable cause for the seizure was not established, and that their testimony in effect would conduce to establish such reasonable cause.

Several answers may be given to this objection. In the first place, it is not true, that the mere liability of a party to an action in one event of a suit will constitute of itself an absolute or universal objection to his competency. There are many exceptions to the rule on this subject, founded upon necessity, or public policy, or the remoteness, the uncertainty, or the contingent nature of the liability. The present case falls directly within these exceptions. The witnesses were acting as the agents of the government in making the search and seizure; they alone could give testimony as to the facts attending such search and seizure, and were, therefore, witnesses from necessity; and their acts being adopted or authorized by the government, public policy requires that the government should have the means of enforcing its own rights through the instrumentality of their testimony. Their competency for such purposes falls directly within the reasoning of the Court of King's Bench in *207] the case of *The King* v. *Williams*, 9 Barn. & C., 549, and the case of *United States* v. **Murphy*, 16 Pet., 203, where the subject was considered very much at large.

In the next place, the witnesses were not objectionable in point of competency on account of any interest in the event of the cause. Their interest, if any they had, as informers or otherwise, in the forfeiture, was completely removed by the provision of the 91st section of the Duty-Collection Act of 1799, chap. 128, which, when they are used as witnesses, takes away from them the share of the forfeiture to which they would otherwise be entitled. In the event of the suit, therefore, they had no interest, for the suit was solely to enforce the forfeiture. The question, whether there was probable or reasonable cause for the seizure, constituted no part of the issue to be tried by the jury. So far as it respected throwing the *onus probandi* upon the claimants, it was a matter solely for the consideration of the court in the progress of the trial, and collateral to the main inquiry, although of great importance in regulating the nature and extent and sufficiency of the evidence. And so far as respected the certificate and entry of reasonable cause to protect the seizors from future liability for the seizure, it was no part of the issue, and, indeed, was an act to be done by the court before whom the prosecution was tried, only in case judgment upon the verdict should pass for

the claimants; and it, therefore, was plainly an act to be done and inquiry to be had posterior to the trial.

In the next place, the objection taken was to the competency of the witnesses, as such, for any purposes in the cause. They were not called by the government as witnesses to give evidence of matters showing reasonable or probable cause for the seizure, but as witnesses generally "to support the issue on the part," of the government. If competent for any purpose upon the trial, they could not be rejected generally; and that they were competent to prove "the facts attending the seizure of the goods, and that certain original marks on packages containing the said goods had been erased, and among them the mark [B]F, which was originally upon one of the said packages," cannot, in our judgment, admit of any just doubt. It could make no difference as to their admissibility for these purposes, that collaterally these facts might bear upon the question of probable or reasonable cause or not.

In the next place, there was another and independent ground upon which their competency is clear. It is, that they were acting under a search-warrant in making the search and seizure, which would undoubtedly, under the 68th section of the same act, be a complete protection to them against all liability to any suit therefor, unless indeed in a case where the witnesses acted from malice, and also without probable cause; and the absence of either would exonerate them from all liability. So that in this view their liability was remote, contingent, and uncertain.

*Upon all these grounds we are of opinion, that the witnesses were clearly admissible. [*208

Another objection was to the admissibility of a bill of lading, entry, and owner's oath, taken on the 16th of July, 1839, in the month preceding the seizure of the goods in question, of nineteen cases of goods (not part of the goods seized) marked [B]F, 1 *a* 19. Although this evidence was objected to, and it was admitted, yet it does not appear upon the record, that any exception was taken to the ruling. But, without dwelling upon this, which was perhaps an accidental omission, it is proper to say, that this evidence was not offered as a single, isolated document, (for in that view it might be deemed at most as irrelevant and inconsequential for any purpose,) but it was offered in connection with other documents and evidence to establish a privity between Taylor and Blackburne & Co. in other importations of a kindred character, and under a scheme of meditated fraud upon the revenue of the United States, of which these documents were a link in the chain. For this purpose they might be important and necessary; and although

the whole evidence is not set forth in the record, yet it is apparent, from what is there found in reference to the next objection, that the evidence had an intimate connection and bearing upon that which is there stated.

The objection here alluded to is in the record stated in the following words: "The counsel of the United States"—[see the paragraph in the statement of the Reporter which is included within brackets.] Now, we think the exception to this evidence was properly overruled, and the evidence admissible to establish the connection between Taylor and Blackburne in other importations as well as in the importation of the goods now in controversy, and also to displace any presumption that the acts of the one were not properly to be deemed attributable to any connivance with the other, or that they were not jointly interested in the same scheme of importations, and mutually cognisant of the designs of each other. What effect this evidence ought to have after its admission in the cause, taken in connection with the other evidence, was a matter for the consideration of the jury alone; but of its admissibility for the purposes above stated we entertain no doubt. It is, indeed, a strange omission in the record, that the other evidence in the case is not therein fully stated, nor the points, to which it was adduced, suggested, so that we are left to conjecture from very imperfect materials what was the true extent and bearing of the various matters excepted to as improper evidence.

Another objection is to a question put to Abraham J. Lewis, a witness on behalf of the United States, who, having stated that his firm were importers of cloths and kerseymeres, and that he had thereby a knowledge of their quality, was asked, on cross-examination, to state the extent of the importa-
*209] tions of his firm; and in reply he said, "Formerly we imported large quantities of woollens; for *three or four years past we have imported but a few packages annually." Whereupon the counsel for the United States, on re-examination, proposed the following question, viz.: "Was there any thing in the state of the market, which caused the alteration which you have mentioned in the amount imported by you within four or five years last past?" to which question the claimants objected; but the judge allowed the question to be put, saying it might have some bearing on the case, and that it was but following out the question put on the cross-examination. We think the decision of the court was perfectly correct, for the reason stated by the judge. The answer might show that the witness had ceased to import so largely, not from want of skill or capital, but for reasons which might

connect themselves with the importations of the claimants. What the answer was we do not know; and certainly it could be no just ground of exception, that the answer was such as had no bearing either way upon the merits of the case, and *a fortiori* not, if favorable to the claimants.

Another objection was to the admissibility of the evidence of David Gardner, who was offered to prove that certain goods, marked [B]F, which had been imported into New York, in the ship Eutaw, being the same on which Francis Blackburne was alleged to have paid the freight, were still in the custom-house at New York. We think that this evidence was properly admissible, for the same reasons as those which have been already stated. It was a part of the *res gestæ*. If the other parts of the evidence were favorable to the innocence of the claimants in their various importations, then no conclusion against them could fairly be drawn from this fact. But if, on the other hand, strong circumstances of suspicion of fraud attached to other importations, then the circumstance, so contrary to the usual course of mercantile transactions in cases of perishable articles, or articles liable to depreciation or decay, of their remaining long in the custom-house, might fairly be deemed to inflame those suspicions, especially if in the interval the government was on the alert to detect supposed frauds in other importations.

Another objection was to the admission of the evidence of an invoice of merinoes, (not part of the goods mentioned in the information,) entered in Philadelphia, by Blackburne & Co., and marked [B]F, 35 to 53, offered as strengthening the evidence of the ownership of packages with this mark. In this view we can perceive no possible question as to the competency or propriety of the evidence.

Another objection was to the admissibility in evidence of certain invoices of Blackburne, Taylor, Okie & Robinson, to show the absence of any such usage as to the allowance of five per cent. for measurement, as had been testified to by the witnesses on the part of the claimants. We see no just ground of exception to the admissibility of such evidence. The usage set up was of a general *nature, and all evidence [*210 which went to establish the want of such generality, by proof of the non-existence of such a deduction in invoices of a similar nature—where, if it was general and well known, it ought to be found—was certainly admissible to rebut the presumptions derived from the adverse proof. The same answer may be given, and indeed applies more forcibly, to the evidence given by Robert Walker, a witness for the claimants, who, upon his cross-examination, verified several invoices of his own

importations into the port of New York; and also a letter of one Waite, annexed to one of the invoices. The introduction of this letter was objected to; but it was an accompaniment of the invoice introduced without objection, and it was offered not in chief, but as qualifying and repelling the evidence offered by the claimants as to the five per cent. usage—founded, among that of others, upon the very testimony of Walker. The other invoices verified by Walker were, for the same reason, in our judgment, equally admissible.

We have thus gone over the various objections taken to the competency and admissibility of the testimony in this case; some of which, considering all the circumstances of the case, can scarcely be treated otherwise than as being *inter apices juris;* and shall now proceed to examine the exceptions taken to the charge of the court. Of many of these it is unnecessary to take any special notice, since they have been already disposed of in the case of *Wood* v. *United States*, 16 Pet., 342, or have incidentally fallen under notice in the preceding parts of this opinion. Upon the point that the revenue laws, on which the information was founded, were not, as the judge in the court below suggested, to be deemed penal laws in the sense in which that phase is sometimes used, it may be proper to say a very few words. He treated the point as not of great importance in the case, as we think it was not, since it had no tendency to change the interpretation of the provisions of the revenue laws then under his consideration. In one sense, every law imposing a penalty or forfeiture may be deemed a penal law; in another sense, such laws are often deemed, and truly deserve to be called, remedial. The judge was therefore strictly accurate, when he stated that "It must not be understood that every law which imposes a penalty is, therefore, legally speaking, a penal law, that is, a law which is to be construed with great strictness in favor of the defendant. Laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not, in the strict sense, penal acts, although they may inflict a penalty for violating them." And he added, "It is in this light I view the revenue laws, and I would construe them so as most effectually to accomplish the intention of the legislature in passing them."[1] The same distinction will be found recognized in the elementary writers, as, for example, in Blackstone's Commentaries, *211] (1 Black. Comm., 88;) and Bacon's Abridgment, (statute I, 7, 8;) and Comyns' Digest, (Parliament R. *18,

[1] APPLIED. *Rankin* v. *Hoyt*, 4 How., 332.

R. 19, R. 20;) and it is also abundantly supported by the authorities.

The main exception however to the charge is as to the ruling of the judge that there was probable cause of seizure, and that, therefore, the *onus probandi* to establish the innocence of the importation, and to repel the supposed forfeiture, was upon the claimants. We entirely concur in the opinion of the judge, in his views of the evidence as applicable to this point. He, and not the jury, was to judge whether there was probable cause or not to throw the *onus probandi* on the claimants; for the 71st section of the act of 1799, chap. 128, expressly declares that "the *onus probandi* shall lie on the claimant only where probable cause is shown for such prosecution, to be judged of by the court before whom such prosecution is to be had." [1] In our judgment the circumstances were abundantly sufficient to justify him, nay, to require him to throw the *onus probandi* on the claimants. The extraordinary circumstances connected with the concealment of the goods, the prevarications and false statements of Blackburne, and the undervaluation of the goods, all required the most plenary proofs on the part of the claimants, to deliver the property from the perils by which it was surrounded. The original cost of the purchases could have been fully proved by the claimants, if the transactions were *bona fide* purchases; and they had the most ample means within their power to establish it. Taylor and Blackburne were so completely mixed up in these transactions, as principals and agents, or as joint principals, that the acts of the one might most justly be attributed to the other; and in fact they admit of no reasonable separation as to design or privity of co-operation.

There is but one other exception remaining, which requires any special notice. It is whether the 68th section of the act of 1799, chap. 128, was intended to reach, or does reach cases where, by a false and fraudulent undervaluation, less than the amount of duties required by law has been paid, or whether it applies only to cases where no duties at all have been paid upon the goods. In our opinion, the section was designed to apply equally to both cases In the sense of that section all goods are forfeited on which, by fraud, all the duties shall not have been paid, or secured to be paid, which are by law required to be paid or secured thereon.

Upon the whole, the judgment of the Circuit Court is affirmed.

[1] FOLLOWED. *Buckley* v. *United States*, 4 How., 260. CITED. *Cliquot's Campagne*, 3 Wall., 143.

*JOHN POLLARD ET AL., LESSEE, PLAINTIFF IN ERROR, v. JOHN HAGAN ET AL., DEFENDANTS IN ERROR.

The stipulation contained in the 6th section of the act of Congress, passed on the 2d of March, 1819, for the admission of the state of Alabama into the union, viz.: "that all navigable waters within the said state shall for ever remain public highways, free to the citizens of said state, and of the United States, without any tax, duty, impost, or toll therefor, imposed by said state," conveys no more power over the navigable waters of Alabama, to the government of the United States, than it possesses over the navigable waters of other states under the provisions of the Constitution.[1]

And it leaves as much right in the State of Alabama over them as the original states possess over navigable waters within their respective limits.

The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively; and the new states have the same rights, sovereignty, and jurisdiction over this subject as the original states.[2]

The United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory of which Alabama, or any of the new states, were formed, except for temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia legislatures, and the deeds of cession executed by them to the United States, and the trust created by the treaty of the 30th April, 1803, with the French republic, ceding Louisiana.[3]

Upon the admission of Alabama into the union, the right of eminent domain, which had been temporarily held by the United States, passed to the state. Nothing remained in the United States but the public lands.[4]

The United States now hold the public lands in the new states by force of the deeds of cession and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess or have received by compact with the new states for that particular purpose.

That part of the compact respecting the public lands, is nothing more than the exercise of a constitutional power vested in Congress, and would have been binding on the people of the new states whether they consented to be bound or not.

Under the Florida treaty the United States did not succeed to those rights which the King of Spain had held by virtue of his royal prerogative, but possessed the territory subject to the institutions and laws of its own government.[5]

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[1] CITED. *Hatch* v. *Wallamet Iron Bridge Co.*, 6 Fed. Rep., 332.

[2] FOLLOWED. *Withers* v. *Buckley*, 20 How., 92; *McCready* v. *Virginia*, 4 Otto, 394; *Bridge Co.* v. *United States*, 15 Otto, 491. RELIED ON. *Pennsylvania* v. *Wheeling &c. Bridge Co.*, 13 How., 584. CITED. *Munford* v. *Wardwell*, 6 Wall., 436; *Weber* v. *Harbor Commissioners*, 18 Id., 66; *County of St. Clair* v. *Livingston*, 23 Id., 68.

[3] CITED. *LeRoy* v. *Dunkerly*, 54 Cal., 455.

The admission of a state entitles it to all the lands below ordinary high water mark. *Bissell* v. *Henshaw*, 1 Sawy., 553, 579; *Seabury* v. *Field*, McAll., 1; *Martin* v. *Riddle*, 16 Pet., 367; as the shores of navigable waters and the soil under them; *Griffing* v. *Gibb*, McAll., 212.

Thus a law regulating the use of oyster beds within the territorial limits of the state is valid. *Corfield* v. *Coryell*, 4 Wash. C. C., 471; *Bennett* v. *Boggs*, Baldw., 60; *Fuller* v. *Spear*, 14 Me., 417; *Lunt* v. *Hunter*, 16 Id., 9; *Smith* v. *Levinuo*, 8 N. Y., 472; *The Martha*, Olc., 18; *McCready* v. *Commonwealth*, 27 Gratt. (Va.), 985; s. c. 4 Otto, 391; *Dunham* v. *Lamphere*, 69 Mass., 268.

[4] APPLIED. *Pino* v. *Hatch*, 1 New Mex., 128.

[5] "The admission of the new states into the union on an equality with the original states gives them the same

By the acts of Congress under which Alabama was erected a territory and a state, the common law was extended over it to the exclusion of all other law, Spanish or French.

The treaty of 1795 was not a cession of territory by Spain to the United States, but the recognition of a boundary line, and an admission, by Spain, that all the territory on the American side of the line was originally within the United States.

The United States have never admitted that they derived title from the Spanish government to any portion of territory included within the limits of Alabama; for, by the treaty of 1795, Spain admitted that she had no claim to any territory above the thirty-first degree of north latitude, and the United States derived its title to all below that degree from France, under the Louisiana treaty.

It results from these principles that the right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant land in Alabama which was below usual high water-mark at the time Alabama was admitted into the union.[6]

*THIS case was brought up by writ of error from the Supreme Court of Alabama. [*213

It was an ejectment brought by the plaintiff in error in the Circuit Court (State Court) of Alabama, to recover a lot in the city of Mobile, described as follows, viz.: Bounded on the north by the south boundary of what was originally designated as John Forbes & Co.'s canal, on the west by a lot now or lately in the occupancy of, or claimed by, —— Ezel, on the east by the channel of the river, and on the south by Government street.

The case was similar in its character to the two cases of *City of Mobile* v. *Emanuel et al.*, reported in 1 How., 95, and *Pollard's lessee* v. *Files*, 2 Id., 592. In the report of the first of these cases the locality of the ground and nature of the case are explained.

In 1 How., 97, it is stated that the court charged the jury, that "if the place in controversy was, subsequent to the admission of this state into the union, below both high and low water-mark, then Congress had no right to grant it; and if defendants were in possession, the plaintiffs could not oust them by virtue of the act of Congress." And at page 98 it is remarked, that "the Supreme Court of Alabama did not

absolute rights, notwithstanding the soil was originally in the United States." *Woodman* v. *Kilbourn Mfg. Co.*, 1 Abb. (U. S.), 158, 164; s. c., 1 Biss., 546; *United States* v. *New Bedford Bridge*, 1 Woodb. & M., 401, 409, 411; *Griffing* v. *Gibb*, McAll., 212.

As to the ordinance of 1795, see *Columbus Ins. Co.* v. *Curtenius*, 6 McLean, 209, 212, 217; *Depew* v. *Twiteer*, 5 Ind., 8.

[6] APPROVED. *Barney* v. *Keokuk*, 4 Otto, 337, 338. FOLLOWED. *Doe* v. *Beebe*, 13 How., 26. RE-AFFIRMED. *Goodtitle* v. *Kibbe*, 9 How., 471, 478. CITED. *Smith* v. *Maryland*, 18 How., 74; *Wood* v. *Fowler*, 26 Kan., 689; *Pere Marquette Boom Co.* v. *Adams*, 44 Mich., 405. See also *Strader* v. *Graham*, 10 How., 95; *Dred Scott* v *Sanford*, 19 Id., 490, 501, 506, 508.

decide the first point raised in the bill of exceptions, viz.: that Congress had no right to grant the land to the city of Mobile."

In the case of *Pollard's lessee* v. *Files*, it is remarked (2 How., 601) that "the arguments of both counsel as to the right of the state of Alabama over navigable water in virtue of her sovereignty, are omitted, because the opinion of the court does not touch upon that point."

In the present case, there were objections made upon the trial below to the admission of certain evidence which was offered by the defendant; but these objections were not pressed, and the whole argument turned upon the correctness of the charge of the court, which was as follows: "That if they believed that the premises sued for were below usual high water-mark, at the time the state of Alabama was admitted into the union, then the act of Congress, and the patent in pursuance thereof, could give the plaintiff no title, whether the waters had receded by the labor of man only, or by alluvion; to which plaintiff excepted, and the court signs and seals this bill of exceptions."

Under these instructions the jury found for the defendant, and the Supreme Court of Alabama affirmed the judgment. From this last court the case was brought up, under the 25th section of the Judiciary Act, and the only question was upon the correctness of the above instructions.

Coxe, for the plaintiff in error.
Sergeant, for the defendant in error.

*214] *Coxe*, for plaintiff in error, said, that the only point presented upon the record grew out of the charge of the court. The plaintiff gave in evidence a patent from the United States for the premises in question; an act of Congress, July 2d, 1836, and an act of 26th May, 1824. Proof was given that the waters of Mobile bay, at high tide, overflowed the premises during all the time up to 1822.

This same title has been before the court already and confirmed. 1 How., 95; 2 Id., 591.

The act of Congress admitting Alabama into the union is in 6 Laws U. S., chap. 458, p. 380. The 6th section contains a proviso, that all navigable waters shall remain public highways, &c. Unless this section prevents the land described in the patent from belonging to the United States, the plaintiff must recover under it.

In 14 Pet., 361, the land in question was situated just like this, and the title was confirmed. So in 16 Pet., 234, 245. In

these two cases there is an implied opinion of the court upon the point now under consideration, and the expressed opinion of one judge. 16 Pet., 262, 266.

In 2 How., 599, the point was expressly raised by the counsel on the other side.

If the land did not belong to the United States, it belonged to nobody. Neither the state of Alabama nor the city of Mobile had any title to it. Many lands are in the same situation, subject to be overflowed, and if they belong to nobody, there is an end to all improvement of them, and they must remain public nuisances.

Sergeant, for defendant in error, stated the following points:

1. The plaintiff rested his case entirely upon the act of Congress of the 2d July, 1836, and the patent issued under it, showing no previous or other right. The act and the patent gave him no title to the premises, because,

1st. The United States had nothing to grant or to release; the right, if any, between high and low water-mark being in the state of Alabama, and not in the United States; and if ever in the United States, after Alabama became a state, was passed away and parted with by the act of 1824.

2d. The right and title in and to the premises in question were vested in those under whom defendant claims, by a valid grant from Spain before the treaty of 1803, namely, by the grant of June 9th, 1802.

3d. The grant from Spain, calling for the river as a boundary, maintained the same boundary and followed the river.

4th. The length of the line referred to in the grant does not limit defendant's right, because it is not stated for the purpose of limiting the right, but only as the then distance to the river; because it actually went into the river, and also because the call for the river controls both course and distance.

*2. The act of Congress could not operate as a release or confirmation, because there was no right or color of right for a release or confirmation to operate upon. [*215

3. The right of the defendant was saved and confirmed by the act of 1824, so as to place it thenceforward beyond doubt or question.

(All of Mr. *Sergeant's* remarks which bear upon other points than the one upon which the opinion of the court rested are omitted.)

Had the United States any title to land covered by navigable water, after the admission of Alabama into the union? Judge Catron has decided in favor of the United States, but the court has expressed no opinion in preceding cases. The

land in question was a part of the shore of the river when Alabama was admitted, and was so when the act of 1824 passed. It was a part of the river. What is a river? Are not its banks included? In the language of courts, there are two distinct parts of a river, its shore and its channel. The shores sometimes extend a mile out. They may be left bare at low tide, but are still a part of the river, either for the purposes of navigation or fishing. Beyond that is the channel. The record describes this land as being bounded by the channel of the river. The question, whether the United States had a title after 1817, was not decided in 14 Pet., nor in 16 Id., nor in *Pollard* v. *Files*. It is of little importance to the United States, because free navigation is secured, but of great magnitude to the state. It has been said, that if the decision be against the United States, the shores must remain unimproved. But not so. Their improvement requires local regulation. They are avenues to navigation, and want a nearer guardian than the United States. Other states have the control of similar property. The United States describe the limits of a port in their revenue laws, and if they want a local property they buy it. A state can manage this sort of property better than the United States, who have never done any thing with it. The question is important to the new states, as involving an attribute of sovereignty, the want of which makes an invidious distinction between the old and new states. In 9 Port. (Ala.), 577, there is an outline of the argument upon this subject, and the authorities are cited. See also 589, 591. It is not material for me to examine the power of the King of Spain, because after the transfer in 1803, the country became subject to the common law and statute laws of the United States, except as to previous grants.

At page 596, this particular question is examined, and the case in 10 Pet. referred to.

It appears, therefore, that the Supreme Court of Alabama studied the subject, and there is no adverse decision in this or any state court. On the contrary, the decision of Alabama has been sustained by this court in principle.

*216] A right to the shore between high and low water-mark is a sovereign *right, not a proprietary one. By the treaties of 1803 and 1819 there is no cession of river shores, although land, forts, &c., are mentioned. Why? Because rivers do not pass by grant, but as an attribute of sovereignty. The right passes in a peculiar manner; it is held in trust for every individual proprietor in the state or the United States, and requires a trustee of great dignity. Rivers must be kept open; they are not land, which may be sold, and the right to

them passes with a transfer of sovereignty. 16 Pet., 367, 413, 410, 416.

It follows from this decision, that the rights over rivers became severed from the rights over property. In Pennsylvania, after the Revolution, an act was passed confiscating the property of the Penn family; but no act was passed transferring the sovereignty of the state. The reason is, that no act was necessary. Sovereignty transferred itself, and when this passes, the right over rivers passes too. Not so with public lands. The right which New Jersey acquired in 16 Peters was precisely the right which Alabama claims now. There can be no distinction between those states which acquired their independence by force of arms and those which acquired it by the peaceful consent of older states. The Constitution says, the latter must be admitted into the union on an equal footing with the rest. The dissenting opinion of Judge Thompson (page 419) is not inconsistent with this.

If these positions are right, the United States had nothing below high water-mark. They might have reserved it in the compact with the state. The third article of the treaty with Spain (1 Land Laws, 57,) contains such a reservation. But as it is, the United States have nothing in Alabama but proprietary rights. They cannot put their foot in a state to claim jurisdiction without its consent. No principle is more familiar than this, that whilst a state has granted a portion of its sovereign power to the United States, it remains in the enjoyment of all the sovereignty which it has not voluntarily parted with. This court, though inexpressibly valuable to the country, is yet a court of limited jurisdiction. In the Constitution, what power is given to the United States over the subject we are now discussing? In a territory they are sovereign, but when a state is erected a change occurs. A new sovereign comes in. Where the power of taxation occurs, it is because it has been yielded by compact. 1 McLean, 337, 339, 343, 344, 354, 371, 374, 378.

The case in 10 Pet., 731, *New Orleans* v. *The United States*, sanctions the idea, that the power of which we have been speaking must be held in trust; that the kings of France had jurisdiction over the shore, but it was a police power, and used for the common benefit, not as a proprietary right. If the trust be in the state of Alabama, the United States cannot defeat that trust. The right of accretion could not belong to the United States, because it belongs to the adjacent proprietor.

**Coxe*, in reply, insisted, that former decisions of this [*217

court cover this case. The nature of the ground in question is fully shown in 9 Port. (Ala.), 580, 581; that the tide rises one and a half or two feet. In 10 Peters, 667, property similarly situated is described, where the water would overflow unless confined by banks. It has been said, that the United States cannot exercise acts of ownership over it, but it is conceded that Spain had and exercised jurisdiction to the extent of granting it to individuals. 10 Pet., 679, 680, 681; attorney-general's opinion, 16 Id., 252; 9 Port. (Ala.), 591.

In 10 Pet., 662, no question like the present was raised, as to the power to grant, but whether the property ever had been granted.

The case of *New Orleans* v. *United States* involved merely the question, whether the land had been dedicated to the public. It was like the Pittsburg and Cincinnati cases, differing only as to the facts proved to substantiate such dedication and the code of law which was to govern it. The citations from Domat (723) are designed merely to point out the places which belong to the public. No question was presented or decided, nor was any opinion indicated as to the points involved in this controversy.

Prior to the treaty by which the United States acquired this territory, the former sovereign claimed and exercised the rights which the United States have undertaken to exercise. But it is said, that we must show that our government could be the recipient of this power. Suppose we cannot. Then the right must remain in Spain, which would be a strange result. But we say,

1. That portion of sovereign power which is vested in the United States by our Constitution and laws is unlimited.

2. The exercise of power by any department or functionary of the government, as among and operating on ourselves, is limited.

3. The sovereign power as a nation in its foreign intercourse is subject to no constitutional restraint.

But it is contended, that the right to the shore is a sovereign and political, not a proprietary right. In what the distinction exists, so far as it is applicable to this controversy, has not been explained, and is not easy to be understood. That there is an immense body of lands in all our alluvial territory, from the North river to the Sabine, including the meadows between Newark and New York, those on the Delaware, the rice plantations of Carolina and Georgia, the marshes of Florida, the swamps of Louisiana, is a matter of fact. They are subject to periodical inundations, some daily, some by occasional freshets, some with the semi-annual rise of waters. Accord-

ing to the argument on the other side, all these are to be considered part of the shore. How can a political power be said to exist without a proprietary right over marshes where no one can live?

It is said the treaties of 1803 and 1819 nowhere specify rivers, and from this the conclusion is drawn that they passed as part of the sovereignty. It seems more probable that they passed as part of *the territory. Islands [*218 are mentioned out in the ocean, under which we hold Key West, Tortugas, &c. Why should they be considered merely as incidents to sovereignty and not part of the territory? The language of the grant is, in "full property and sovereignty."

The treaty of 1795, with Spain, (1 Laws U. S., 264,) in designating the boundaries, speaks of them which separate the territories of the contracting parties, and establish part of this line of territory in the middle of a river. Article 4th designates the middle of the channel, or bed of the Mississippi, as the western boundary. In this treaty, as in that of 1819, a river is the boundary, and its free navigation is secured. Did any one ever suppose that either party precluded itself from using the highway, or from holding or disposing of the lands on the banks subject to inundation?

It is said that the land which was in question in *Martin* v. *Waddell*, 16 Pet., 369, was similarly situated to the present; that it was below high water, and thence it is inferred that it was above low water-mark. But the special verdict indicates no such thing. It says, "covered with water," "where the tide ebbs and flows." Nor is there anything in the passages cited (410, 413, 416) conflicting with this idea. New Jersey, who asserted the right sustained in that case, would be astonished to learn the construction now placed upon it, denying the right of private property in the flats left bare at low water, or in the valuable meadows protected by banks from daily inundation, and converted into productive property, conducive equally to health and wealth.

In the lands thus situated, which had not been severed from the public domain, the United States had the capacity to acquire, and did acquire, a proprietary interest. Nor is this repugnant to our Constitution or laws, or the principles of our government. Throughout the union such property is held by individuals under titles sanctioned by legislative acts and judicial decisions.

The sea-shore and arms of the sea, "like other public property, may be granted by the king or government to individual proprietors." 2 Dane's Abr., 690, 691.

The Massachusetts colony act of 1691 grants numerous

pieces of flats to the proprietors of the adjoining uplands. This was in strict conformity with the English law. The soil on which the sea flows and ebbs, that is, between high and low water-marks, may be parcel of a manor. Where the tide flows, it is within the jurisdiction of the admiralty; where the tide ebbs, the land may belong to a subject. Everything done on the land when the sea is out, shall be tried at common law; 5 Co., 107, *Constable's* case. In New York and New Jersey, the inlets of the sea on Long Island and between the Passaic and Hackensack, have all been reclaimed and converted into meadows. When New York claimed the entire jurisdiction of the North river, she never thought of claiming the
*219] *meadows and marshes on the Jersey side, although they were covered at every high tide by the waters of that river.

On the Delaware, in the states of Delaware, New Jersey and Pennsylvania, the same law prevails.

In Maryland, South Carolina, and Georgia, valuable private property has been thus reclaimed from the water.

Throughout our western country, Ohio, Indiana, Illinois, Missouri, Louisiana, Alabama, Mississippi, no question has ever been raised on this point until these cases first presented it. Millions of acres are thus held. The right has been uniformly asserted by the United States. It was so in the act of 20th April, 1818, for the sale of Fort Charlotte lands, which gave rise to the suits in Peters and Porter. 9 Port. (Ala.); 16 Pet., 250; 6 Laws U. S., 846.

The act of May 26th, 1824, expressly grants land of this description, and the act of July, 1836, does the same.

All the titles under these acts are now in controversy. It is said that the United States have little or no interest in this question; but their interest is of incalculable value. See Darley's Louisiana, as to the amount of overflowed lands.

The right has been judiciously recognised. In 16 Pet., 408, *United States* v. *Fitzgerald*, where there was a claim under the pre-emption laws. In the five different cases in which this very grant has been disputed. *Pollard* v. *Kibbe*, 14 Pet., 355, where the title of both parties was presented. So far as the plaintiff's title appears, it was identical with that now exhibited, with the only addition of the Spanish origin, which had been rejected by the board of commissioners. The defendant's title the same as now. All the objections now urged to the plaintiff's title were then apparent on the record. *Mobile* v. *Eslava*, 16 Pet., 234; 9 Port. (Ala.); *Mobile* v. *Hallett*, 16 Pet., 261; *Mobile* v. *Emanuel*, 1 How., 95; *Pollard* v. *Files*, 2 Id., 592.

Mr. Justice McKINLEY delivered the opinion of the court.

This case comes before this court upon a writ of error to the Supreme Court of Alabama.

An action of ejectment was brought by the plaintiffs against the defendants, in the Circuit Court of Mobile county, in said state; and upon the trial, to support their action, "the plaintiffs read in evidence a patent from the United States for the premises in question, and an act of Congress passed the 6th day of July, 1836, confirming to them the premises in the patent mentioned, together with an act of Congress passed the 20th of May, 1824. The premises in question were admitted by the defendants to be comprehended within the patent; and there was likewise an admission by both parties that the land lay between Church street and North Boundary street, in the city of Mobile; and there the plaintiffs rested their case."

*"The defendants, to maintain the issue on their [*220 part, introduced a witness to prove that the premises in question, between the years 1819 and 1823, were covered by water of the Mobile river at common high tide;" to which evidence the plaintiffs by their counsel objected; but the court overruled the objection, and permitted the evidence to go to the jury. "It was also in proof, on the part of the defendant, that at the date of the Spanish grant to Panton, Leslie & Co., under which they claim, the waters of the Mobile bay, at high tide, flowed over what is now Water street, and over about one-third of the lot west of Water street, conveyed by the Spanish grant to Panton, Leslie & Co.; and that the waters continued to overflow Water street, and the premises sued for, during all the time up to 1822 or 1823; to all which admissions of evidence, on part of the defendants, the plaintiffs excepted." "The court charged the jury, that if they believed the premises sued for were below usual high water-mark, at the time Alabama was admitted into the union, then the act of Congress, and the patent in pursuance thereof, could give the plaintiffs no title, whether the waters had receded by the labor of man only, or by alluvion; to which the plaintiffs excepted. Whereupon a verdict and judgment were rendered in favor of the defendants, and which judgment was afterwards affirmed by the Supreme Court of the state."

This question has been heretofore raised, before this court, in cases from the same state, but they went off upon other points. As now presented, it is the only question necessary to the decision of the case before us, and must, therefore, be decided. And we now enter into its examination with a just sense of its great importance to all the states of the union, and

particularly to the new ones. Although this is the first time we have been called upon to draw the line that separates the sovereignty and jurisdiction of the government of the union, and the state governments, over the subject in controversy, many of the principles which enter into and form the elements of the question have been settled by previous, well considered, decisions of this court, to which we shall have occasion to refer in the course of this investigation.

The counsel for the plaintiffs insisted, in argument, that the United States derived title to that part of Alabama, in which the land in controversy lies, from the King of Spain; and that they succeeded to all his rights, powers, and jurisdiction, over the territory ceded, and therefore hold the land and soil, under navigable waters, according to the laws and usages of Spain; and by those laws and usages the rights of a subject to land derived from the crown could not extend beyond high water-mark, on navigable waters, without an express grant; and that all alluvion belonged to the crown, and might be granted by this king, together with all land between high water and
*221] the channel of such navigable waters; and by the compact between the United States and Alabama, on *her admission into the union, it was agreed, that the people of Alabama for ever disclaimed all right or title to the waste or unappropriated lands lying within the state, and that the same should remain at the sole disposal of the United States; and that all the navigable waters within the state should for ever remain public highways, and free to the citizens of that state and the United States, without any tax, duty, or impost, or toll therefor, imposed by that state. That by these articles of the compact, the land under the navigable waters, and the public domain above high water, were alike reserved to the United States, and alike subject to be sold by them; and to give any other construction to these compacts, would be to yield up to Alabama, and the other new states, all the public lands within their limits.

We think a proper examination of this subject will show, that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama, or any of the new states were formed; except for temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia legislatures, and the deeds of cession executed by them to the United States, and the trust created by the treaty with the French republic, of the 30th of April, 1803, ceding Louisiana.

All that part of Alabama which lies between the thirty-first and thirty-fifth degree of north latitude, was ceded by the

state of Georgia to the United States, by deed bearing date the 24th day of April, 1802, which is substantially, in all its principles and stipulations, like the deed of cession executed by Virginia to the United States, on the 1st day of March, 1784, by which she ceded to the United States the territory north-west of the river Ohio. Both of these deeds of cession stipulated, that all the lands within the territory ceded, and not reserved or appropriated to other purposes, should be considered as a common fund for the use and benefit of all the United States, to be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatever. And the statute passed by Virginia authorizing her delegates to execute this deed, and which is recited in it, authorizes them, in behalf of the state, by a proper deed to convey to the United States, for the benefit of said states, all the right, title, and claim, as well of soil as jurisdiction, "upon condition that the territory so ceded shall be laid out and formed into states, containing a suitable extent of territory, not less than 100, nor more than 150 miles square, or as near thereto as circumstances will admit: and that the states so formed shall be republican states and admitted members of the federal union, having the same rights of sovereignty, freedom, and independence, as the other states." And the delegates conclude the deed thus: "Now know ye, that we, the said Thomas Jefferson, Samuel Hardy, Arthur Lee, and James Monroe, by virtue of the *power and authority committed [*222 to us by the act of the said general assembly of Virginia before recited, and in the name and for and on behalf of the said commonwealth, do by these presents convey, transfer, assign, and make over unto the United States in Congress assembled, for the benefit of said states, Virginia inclusive, all right, title, and claim, as well of soil as of jurisdiction, which the said commonwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying, and being to the north-west of the river Ohio, to and for the uses and purposes, and on the conditions of the said recited act."

And in the deed of cession by Georgia it is expressly stipulated, "That the territory thus ceded shall form a state and be admitted as such into the union as soon as it shall contain sixty thousand free inhabitants, or at an earlier period if Congress shall think it expedient, on the same conditions and restrictions, with the same privileges, and in the same manner, as is provided in the ordinance of Congress of the 13th day of July, 1787, for the government of the north-western territory of the United States, which ordinance shall in all its parts

extend to the territory contained in the present act of cession, that article only excepted which forbids slavery." The manner in which the new states were to be admitted into the union, according to the ordinance of 1787, as expressed therein, is as follows: "And whenever any of the said states shall have sixty thousand free inhabitants therein, such state shall be admitted by its delegates into the Congress of the United States, on an equal footing with the original states in all respects whatever." Thus it appears that the stipulations, trusts, and conditions, are substantially the same in both of these deeds of cession; and the acts of Congress, and of the state legislatures in relation thereto, are founded in the same reasons of policy and interest, with this exception, however—the cession made by Virginia was before the adoption of the Constitution of the United States, and that of Georgia afterwards. Taking the legislative acts of the United States, and the states of Virginia and Georgia, and their deeds of cession to the United States, and giving to each, separately, and to all jointly, a fair interpretation, we must come to the conclusion that it was the intention of the parties to invest the United States with the eminent domain of the country ceded, both national and municipal, for the purposes of temporary government, and to hold it in trust for the performance of the stipulations and conditions expressed in the deeds of cession and the legislative acts connected with them. To a correct understanding of the rights, powers, and duties of the parties to these contracts, it is necessary to enter into a more minute examination of the rights of eminent domain, and the right to the public lands. When the United States accepted the cession of the territory, they took upon themselves the trust to hold
*223] the municipal eminent domain for the new states, and to invest them with it, to *the same extent, in all respects, that it was held by the states ceding the territories.

The right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the state, is called the *eminent domain*. It is evident that this right is, in certain cases, necessary to him who governs, and is, consequently, a part of the empire, or sovereign power. Vat. Law of Nations, section 244. This definition shows, that the eminent domain, although a sovereign power, does not include all sovereign power, and this explains the sense in which it is used in this opinion. The compact made between the United States and the state of Georgia, was sanctioned by the Constitution of the United States; by the 3d section of the 4th article of which it is declared, that "New states may be admitted by the Congress

into this union; but no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states or parts of states, without the consent of the legislatures of the states concerned, as well as of Congress."

When Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands. And, if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative: because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted.[1]

By the 16th clause of the 8th section of the 1st article of the

[1] The statement, that the United States government has no power to take lands within the boundaries of a state by the exercise of the right of eminent domain, has been overruled by the Supreme Court of the United States, (*Kohl* v. *United States*, 1 Otto, 367,) without any reference to this statement. A quotation of a single sentence from Cooley on Constitutional Limitations is made by the court, and relied upon: "So far, however, as the general government may deem it important to appropriate lands or other property for its own purposes and to enable it to perform its functions,—as must sometimes be necessary in the case of forts, light-houses, military posts or roads, and other conveniences and necessities of government —the general government may still exercise the authority, as well within the state as within the territory under its exclusive jurisdiction, and its right to do so may be supported by the same reasons which support the right in any case; that is to say, the absolute necessity that the means in the government for performing its functions and perpetuating its existence should not be liable to be controlled or defeated by the want of consent of private parties, or of any other authority." *Cooley Const. Lim.*, 651, (5 ed.) In *Gilmer* v. *Lime Point*, 18 Cal., 229, it was held that the state might take property by the exercise of the right of eminent domain and devote it to the general government for its use. So in *Burt* v. *Merchants' Ins. Co.*, 106 Mass., 356; s. c. 115 Mass., 1; *Burt* v. *Wigglesworth*, 117 Id., 302. So it might pass an act authorizing the general government to take land for public use under the clause in the constitution of the state authorizing the state to take land for the public use. *Reddall* v. *Bryon*, 14 Md., 444. See *Ash* v. *Cummings*, 50 N. H., 591. But in *People ex rel. Twombly* v. *Auditor General*, 23 Mich., 471, it was held that the state could not thus take and appropriate lands, for the general government had the power to take such lands when it deemed it necessary, and therefore, the state had no authority to do so; and in *Darlington* v. *United States*, 82 Pa. St., 382, the act of Congress authorizing such a taking was upheld.

Constitution, power is given to Congress "to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may by cession of particular states, and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased, by the consent of the legislature of the state in which the same may be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." Within the District of Columbia, and the other places purchased and used for the purposes above mentioned, the national and municipal powers of government, of every description, are united in the government of the union. And these are the only cases, within the United States, in which all
*224] the powers of government are united in a single government, except in the cases already *mentioned of the temporary territorial governments, and there a local government exists. The right of Alabama and every other new state to exercise all the powers of government, which belong to and may be exercised by the original states of the union, must be admitted, and remain unquestioned, except so far as they are, temporarily, deprived of control over the public lands.

We will now inquire into the nature and extent of the right of the United States to these lands, and whether that right can in any manner affect or control the decision of the case before us. This right originated in voluntary surrenders, made by several of the old states, of their waste and unappropriated lands, to the United States, under a resolution of the old Congress, of the 6th of September, 1780, recommending such surrender and cession, to aid in paying the public debt, incurred by the war of the Revolution. The object of all the parties to these contracts of cession, was to convert the land into money for the payment of the debt, and to erect new states over the territory thus ceded; and as soon as these purposes could be accomplished, the power of the United States over these lands, as property, was to cease.

Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new states will be complete, throughout their respective borders, and they, and the original states, will be upon an equal footing, in all respects whatever. We, therefore, think the United States hold the public lands within the new states by force of the deeds of cession, and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess, or have reserved by compact with the new states, for that particular purpose. The provision of the Constitution

above referred to shows that no such power can be exercised by the United States within a state. Such a power is not only repugnant to the Constitution, but it is inconsistent with the spirit and intention of the deeds of cession. The argument so much relied on by the counsel for the plaintiffs, that the agreement of the people inhabiting the new states, "that they for ever disclaim all right and title to the waste or unappropriated lands lying within the said territory; and that the same shall be and remain at the sole and entire disposition of the United States," cannot operate as a contract between the parties, but is binding as a law. Full power is given to Congress "to make all needful rules and regulations respecting the territory or other property of the United States." This authorized the passage of all laws necessary to secure the rights of the United States to the public lands, and to provide for their sale, and to protect them from taxation.

And all constitutional laws are binding on the people, in the new states and the old ones, whether they consent to be bound by them or not. Every constitutional act of Congress is passed by the will of the people of the United States, expressed through their representatives, *on the subject- [*225 matter of the enactment; and when so passed it becomes the supreme law of the land, and operates by its own force on the subject-matter, in whatever state or territory it may happen to be. The proposition, therefore, that such a law cannot operate upon the subject-matter of its enactment, without the express consent of the people of the new state where it may happen to be, contains its own refutation, and requires no farther examination. The propositions submitted to the people of the Alabama territory, for their acceptance or rejection, by the act of Congress authorizing them to form a constitution and state government for themselves, so far as they related to the public lands within that territory, amounted to nothing more nor less than rules and regulations respecting the sales and disposition of the public lands. The supposed compact relied on by the counsel for the plaintiffs, conferred no authority, therefore, on Congress to pass the act granting to the plaintiffs the land in controversy.

And this brings us to the examination of the question, whether Alabama is entitled to the shores of the navigable waters, and the soils under them, within her limits. The principal argument relied on against this right, is, that the United States acquired the land in controversy from the King of Spain. Although there was no direct reference to any particular treaty, we presume the treaty of the 22d of February, 1819, signed at Washington, was the one relied on, and shall so con-

sider the argument. It was insisted that the United States had, under the treaty, succeeded to all the rights and powers of the King of Spain; and as by the laws and usages of Spain, the king had the right to grant to a subject the soil under navigable waters, that, therefore, the United States had the right to grant the land in controversy, and thereby the plaintiffs acquired a complete title.

If it were true that the United States acquired the whole of Alabama from Spain, no such consequences would result as those contended for. It cannot be admitted that the King of Spain could, by treaty or otherwise, impart to the United States any of his royal prerogatives; and much less can it be admitted that they have capacity to receive or power to exercise them. Every nation acquiring territory, by treaty or otherwise, must hold it subject to the constitution and laws of its own government, and not according to those of the government ceding it. Vat. Law of Nations, b. 1, c. 19, s. 210, 244, 245, and b. 2, c. 7, s. 80.

The United States have never claimed any part of the territory included in the states of Mississippi or Alabama, under any treaty with Spain, although she claimed at different periods a considerable portion of the territory in both of those states. By the treaty between the United States and Spain, signed at San Lorenzo el Real, on the 27th of October, 1795, "The high contracting parties declare and agree, that the line between the United States and East and West Florida, shall *226] be designated by a line, beginning on the river *Mississippi, at the northernmost part of the thirty-first degree of north latitude, which from thence shall be drawn due east to the middle of the Chatahouchee river," &c. This treaty declares and agrees, that the line which was described in the treaty of peace between Great Britain and the United States, as their southern boundary, shall be the line which divides their territory from East and West Florida. The article does not import to be a cession of territory, but the adjustment of a controversy between the two nations. It is understood as an admission that the right was originally in the United States.

Had Spain considered herself as ceding territory, she could not have neglected to stipulate for the property of the inhabitants, a stipulation which every sentiment of justice and of national honor would have demanded, and which the United States would not have refused. But, instead of requiring an article to this effect, she expressly stipulated to withdraw the settlements then within what the treaty admits to be the territory of the United States, and for permission to the settlers

to take their property with them. "We think this an unequivocal acknowledgment that the occupation of the territory by Spain was wrongful, and we think the opinion thus clearly indicated was supported by the state of facts. It follows, that Spanish grants made after the treaty of peace can have no intrinsic validity." *Henderson* v. *Poindexter*, 12 Wheat., 535.

Previous to the cession made by Georgia, the United States, by the act of Congress of the 7th of April, 1798, had established the Mississippi territory including the territory west of the Chatahouchee river, to the Mississippi river, above the 31st degree of north latitude, and below the Yazous river, subject to the claim of Georgia to any portion of the territory. And the territory thus erected was subjected to the ordinance of the 13th of July, 1787, for its government, that part of it excepted which prohibited slavery: 1 Story's Laws, 494. And by the act of the 1st of March, 1817, having first obtained consent of Georgia to make two states instead of one within the ceded territory, Congress authorized the inhabitants of the western part of the Mississippi territory to form for themselves a constitution and state government, "to consist of all the territory included within the following boundaries, to wit: Beginning on the river Mississippi at the point where the southern boundary line of the state of Tennessee strikes the same; thence east along the said boundary line to the Tennessee river; thence up the same to the mouth of Bear creek: thence by a direct line, to the north-west corner of Washington county; thence due south to the Gulf of Mexico; thence westwardly, including all the islands within six leagues of the shore, to the junction of Pearl river with Lake Borgne; thence up said river to the thirty-first degree of north latitude; thence west along said degree of latitude to the Mississippi river; thence up the same to the beginning." 3 Story's Laws, 1620. *And on the 3d of March, 1817, Congress passed [*227 an act declaring, "That all that part of the Mississippi territory which lies within the following boundaries, to wit: Beginning at the point where the line of the thirty-first degree of north latitude intersects the Perdido river; thence east to the western boundary line of the state of Georgia; thence along said line to the southern boundary line of the state of Tennessee; thence west, along said boundary line, to the Tennessee river; thence up the same to the mouth of Bear creek; thence by a direct line to the north-west corner of Washington county; thence due south to the Gulf of Mexico; thence eastwardly, including all the islands within six leagues of the shore to the Perdido river; thence up the same to the begin-

ning; shall, for the purposes of temporary government, constitute a separate territory, and be called Alabama.

And by the 2d section of the same act it is enacted, "That all offices which exist, and all laws which may be in force when this act shall go into effect, shall continue to exist and be in force until otherwise provided by law." 3 Story's Laws, 1634, 1635. And by the 2d article of the compact contained in the ordinance of 1787, which was then in force in the Mississippi territory, among other things, it was provided, that "The inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, and of the trial by jury, and of judicial proceedings according to the course of the common law." And by the proviso to the 5th section of the act of the 2d of March, 1819, authorizing the people of the Alabama territory to form a constitution and state government, it is enacted, "That the constitution, when formed, shall be republican, and not repugnant to the ordinance of the 13th of July, 1787, between the states and the people of the territory north-west of the Ohio river, so far as the same has been extended to the said territory [of Alabama] by the articles of agreement between the United States and the state of Georgia." By these successive acts on part of the United States, the common law has been extended to all the territory within the limits of the state of Alabama, and therefore excluded all other law, Spanish or French.

It was after the date of the treaty of the 22d of February, 1819, between the United States and Spain, but before its ratification, the people of the Alabama territory were authorized to form a constitution; and the state was admitted into the union, according to the boundaries established when the country was erected into a territorial government. But the United States have never admitted that they derived title from the Spanish government to any portion of the territory included within the limits of Alabama. Whatever claim Spain may have asserted to the territory above the thirty-first degree of north latitude, prior to the treaty of the 27th of October, 1795, was abandoned by that treaty, as has been already shown. We will now inquire whether she had any *228] right to territory below *the thirty-first degree of north latitude, after the treaty between France and the United States, signed at Paris on the 30th of April, 1803, by which Louisiana was ceded to the United States. The legislative and executive departments of the government have constantly asserted the right of the United States to this portion of the territory under the 1st article of this treaty; and a series of measures intended to maintain the right have been

adopted. Mobile was taken possession of, and erected into a collection district, by act of the 24th of February, 1804, chap. 13, (2 Story's Laws, 914.) In the year 1810, the President issued his proclamation, directing the governor of the Orleans territory to take possession of the country, as far as the Perdido, and hold it for the United States. In April, 1812, Congress passed an act to enlarge the limits of Louisiana. This act includes part of the country claimed by Spain, as West Florida. And in February, 1813, the President was authorized to occupy and hold all that tract of country called West Florida, which lies west of the river Perdido, not then in the possession of the United States. And these measures having been followed by the erection of Mississippi territory into a state, and the erection of Alabama into a territory, and afterwards into a state, in the year 1819, and extending them both over this territory: could it be doubted that these measures were intended as an assertion of the title of the United States to this country?

In the case of *Foster* and *Elam* v. *Neilson*, 2 Pet., 253, the right of the United States to this country underwent a very able and thorough investigation. And Chief Justice Marshall, in delivering the opinion of the court, said: "After these acts of sovereign power over the territory in dispute, asserting the American construction of the treaty, by which the government claims it, to maintain the opposite construction in its own courts would certainly be an anomaly in the history and practice of nations. If those departments, which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied." The chief justice then discusses the validity of the grant made by the Spanish government, after the ratification of the treaty between the United States and France, and it is finally rejected on the ground that the country belonged to the United States, and not to Spain, when the grant was made. The same doctrine was maintained by this court in the case of *Garcia* v. *Lee*, 12 Pet., 511. These cases establish, beyond controversy, the right of the United States to the whole of this territory, under the treaty with France.

Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, *to the same extent that Georgia possessed it before she ceded it to the United States. To [*229

maintain any other doctrine, is to deny that Alabama has been admitted into the union on an equal footing with the original states, the constitution, laws, and compact, to the contrary notwithstanding. But her rights of sovereignty and jurisdiction are not governed by the common law of England as it prevailed in the colonies before the Revolution, but as modified by our own institutions. In the case of *Martin and others* v. *Waddell*, 16 Pet., 410, the present chief justice, in delivering the opinion of the court, said: "When the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution." Then to Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights.

The declaration, therefore, contained in the compact entered into between them when Alabama was admitted into the union, "that all navigable waters within the said state shall for ever remain public highways, free to the citizens of said state, and of the United States, without any tax, duty, impost, or toll therefor, imposed by the said state," would be void if inconsistent with the Constitution of the United States. But is this provision repugnant to the Constitution? By the 8th section of the 1st article of the Constitution, power is granted to Congress "to regulate commerce with foreign nations, and among the several states." If, in the exercise of this power, Congress can impose the same restrictions upon the original states, in relation to their navigable waters, as are imposed, by this article of the campact, on the state of Alabama, then this article is a mere regulation of commerce among the several states, according to the Constitution, and, therefore, as binding on the other states as Alabama.

In the case of *Gibbons* v. *Ogden*, 9 Wheat., 196, after examining the preliminary questions respecting the regulation of commerce with foreign nations, and among the states, as connected with the subject-matter there in controversy, Chief Justice Marshall said: "We are now arrived at the inquiry: What is this power?

"It is the power to regulate, that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are

expressed in plain terms, and do not affect the questions which arise in this case. If, as has been always understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over *commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." As the provision of what is called the compact between the United States and the state of Alabama does not, by the above reasoning, exceed the power thereby conceded to Congress over the original states on the same subject, no power or right was, by the compact, intended to be reserved by the United States, nor to be granted to them by Alabama. [*230

This supposed compact is, therefore, nothing more than a regulation of commerce, to that extent, among the several states, and can have no controlling influence in the decision of the case before us. This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers. But in the hands of the states this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. For, although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the Constitution of the United States, "and the laws which shall be made in pursuance thereof."[1]

By the preceding course of reasoning we have arrived at these general conclusions: First, The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, The new states have the same rights, sovereignty, and jurisdiction over this subject as the original states. Thirdly, The right of the United States to the public lands, and the power of Congress to make all needful rules

[1] QUOTED. *Gilman* v. *Philadelphia*, 3 Wall., 726.

and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case. The judgment of the Supreme Court of the state of Alabama is, therefore, affirmed.

Mr. Justice CATRON dissented.

The statute of 1836, and the patent of the United States founded on it, by which the land in controversy was granted to Wm. Pollard's heirs, have on several occasions heretofore received the sanction of this court as a valid title.

*231] 1. In the case of *Pollard's heirs* v. *Kibbe*, 14 Pet., 353, the *Supreme Court of Alabama having pronounced an opposing claim under the act of 1824 superior to Pollard's, this court reversed the judgment and established the latter, after the most mature consideration.

2. In the case of *Pollard* v. *Files*, 2 How., 591, the precise title was again brought before this court, and very maturely considered; it was then said—(page 602)—"This court held, when Pollard's title was before it formerly, that Congress had the power to grant the land to him by the act of 1836: on this point there was no difference of opinion at that time among the judges. The difference to which the Supreme Court of Alabama refers, (in its opinion in the record,) grew out of the construction given by a majority of the court to the act of 1824, by which the vacant lands east of Water street were granted to the city of Mobile."

On this occasion the decision of the Supreme Court of Alabama was again reversed, and Pollard's heirs ordered to be put into possession, and they now maintain it under our two judgments. It is here for the third time.

In the mean time, between 1840 and 1844, a doctrine had sprung up in the courts of Alabama, (previously unheard of in any court of justice in this country, so far as I know,) assuming that all lands temporarily flowed with tide-water were part of the eminent domain and a sovereign right in the old states; and that the new ones when admitted into the union, coming in with equal sovereign rights, took the lands thus flowed by implication as an incident of state sovereignty, and thereby defeated the title of the United States, acquired either by the treaty of 1803, or by the compacts with Virginia or Georgia. Although the assumption was new in the courts, it was not entirely so in the political discussions of the country; there it had been asserted, that the new states coming in, with equal rights appertaining to the old ones, took the high lands as well as the low, by the same implication now successfully asserted here in regard to the low lands; and indeed it is difficult

to see where the distinction lies. That the United States acquired in a corporate capacity the right of soil under water, as well as of the high lands, by the treaty with France, cannot be doubted; nor that the right of soil was retained and subject to grant up to the time Alabama was admitted as a state. Louisiana was admitted in 1812; to her the same rules must apply that do to Alabama. All acquainted with the surface of the latter know that many of the most productive lands there, and now in successful cultivation, were in 1812 subject to overflow, and have since been reclaimed by levees.

It is impossible to deal with the question before us understandingly, without reference to the physical geography of the delta of the Mississippi and the country around the gulf of Mexico, where the most valuable lands have been made and are now forming by alluvion deposits of the floating soils brought down by the great rivers; the *earlier of [*232 which had become dry lands; but the more recent were flowed, when we acquired the country; and are in great part yet so: thus situated they have been purchased from the United States and reclaimed; a process that is now in daily exercise. An assumption that mud-flats and swamps once flowed, but long since reclaimed, had passed to the new states, on the theory of sovereign rights, did, at the first, strike my mind as a startling novelty; nor have I been enabled to relieve myself from the impression, owing to the fact in some degree, it is admitted, that for thirty years neither Congress, or any state legislature, has called in question the power of the United States to grant the flowed lands, more than others: the origin of title, and its continuance, as to either class, being deemed the same. A right so obscure, and which has lain dormant, and even unsuspected, for so many years, and the assertion of which will strip so much city property, and so many estates of all title, should as I think be concluded by long acquiescence, and especially in courts of justice.

Again: the question before us is made to turn by a majority of my brethren exclusively on political jurisdiction; the right of property is a mere incident. In such a case, where there is doubt, and a conflict suggested, the political departments, state and federal, should settle the matter by legislation: by this means private owners could be provided for and confusion avoided; but no state complains, nor has any one ever complained, of the infraction of her political and sovereign rights by the United States, or by their agents, in the execution of the great trust imposed on the latter to dispose of the public domain for the common benefit; on the contrary, we are called on by a mere trespasser in the midst of a city, to assert

and maintain this sovereign right for his individual protection, in sanction of the trespass.

But as already stated, the United States may be an owner of property in a state, as well as another state, or a private corporation, or an individual may: That the proprietary interest is large, cannot alter the principle. I admit if the agents of the United States obstruct navigation, the state authorities may remove the obstructions and punish the offenders; so the states have done for many years without inconvenience, or complaint.

Nor can material inconvenience result. If a front to a city, or land for another purpose is needed, Congress can be applied to for a grant as was done by the corporation of Mobile in 1824: If the state where the land lies was the owner the same course would have to be pursued. The states and the United States are not in hostility; the people of the one are also the people of the other; justice and donation is alike due from each.

Connecticut was once a large proprietor in the North-West Territory, (now Ohio.) She owned the shores of a great lake and the banks of navigable rivers: Can it be assumed *233] that the admission of *Ohio defeated the title of Connecticut, and that she could not grant? The question will not bear discussion—and how can the case put be distinguished from the one before us: Nay, how can either be distinguished from the rights of private owners of lands above water, or under the water? Yet in either instance, is the owner in fee deprived of his property, on this assumption of sovereign rights.

The front of the city of Mobile is claimed by the act of 1824, sanctioned by this court as a valid grant in the five cases of *Pollard* v. *Kibbe*, 14 Pet.; of *The City of Mobile* v. *Eslava*, 16 Id., 234; of *the same plaintiff* v. *Hallet*, 16 Id., 261; of *the same plaintiff* v. *Emanuel*, 1 How., 95, and of *Pollard* v. *Files*, 2 Id., 591. Except the grant to Pollard, the act of 1824 confers the entire title, (so far as is known to this court,) of a most valuable portion, and a very large portion, of the second city on the Gulf of Mexico, in wealth and population. This act is declared void in the present cause; and the previous decisions of this court are either directly, or in effect, overthrown, and the private owners stripped of all title. On this latter point my brethren and I fully agree: Can Alabama remedy the evil, and confirm the titles by legislation or by patent? I say by patent, because this state, Louisiana, Mississippi, and surely Florida, will of necessity have to adopt some system of giving title if it is possible to do so, aside

from private legislation; as the flowed lands are too extensive and valuable for the latter mode of grant in all instances.

The charge of the state court to the jury was, that the act of Congress of 1836, and the patent founded on it, and also, of course, the act of 1824, were void, if the lands granted by them were flowed at high tide when Alabama was admitted; and it was immaterial whether the mud-flat had been filled up and the water excluded by the labor of man or by natural alluvion. And this charge is declared to have been proper, by a majority of this court.

The decision founds itself on the right of navigation, and of police connected with navigation. As a practical truth, the mud-flats and other alluvion lands in the delta of the river Mississippi, and around the Gulf of Mexico, formed of rich deposits, have no connection with navigation, but obstruct it, and must be reclaimed for its furtherance. This is well illustrated by the recent history of Mobile. When the act of 1824 was passed, granting to the corporation the front of the city, it was excluded from the navigable channel of the river by a mud-flat, slightly covered with water at high tide, of perhaps a thousand feet wide. This had to be filled up before the city could prosper, and of course, by individual enterprise, as the vacant space, as was apparent, must become city property; and it is now formed into squares and streets, having wharves and warehouses. The squares are built up; and the fact that that part of the city stands on land once subject to the flow of tide, will soon be matter of history. At [*284 New Orleans, and at most other places fronting *rivers where the tide ebbs and flows, as well as on the ocean and great lakes, navigation is facilitated by similar means; without their employment few city fronts could be formed, at all accommodated to navigation and trade. To this end private ownership is indispensable and universal; and some one must make title. If the United States have no power to do so, who has? I repeat, can Alabama grant the soil? She disavowed all claim and title to and in it, as a condition on which Congress admitted her into the union. By the act of March 2, 1819, (3 Story's Laws, 1726,) the Alabama territory was authorized to call a convention, and form a state constitution; but Congress imposed various restrictions, and among others the following one: "And provided always, that the said convention shall provide by an ordinance, irrevocable without the consent of the United States, that the people inhabiting said territory do agree and declare that they forever disclaim all right and title to the waste or unappropriated lands lying

within the said territory, and that the same shall be, and remain at the sole and entire disposition of the United States."

On the 2d of August, 1819, the convention of Alabama formed a constitution, and adopted an ordinance declaring "that this convention, for and on behalf of the people inhabiting this state, do ordain, agree, and declare, that they forever disclaim all right and title to the waste or unappropriated lands lying within this state; and that the same shall be and remain at the sole and entire disposition of the United States." In addition, all the propositions offered by the act of March 2, 1819, were generally accepted without reservation.

On the 14th of December, 1819, Congress, by resolution, admitted Alabama as a state, on the conditions above set forth. 3 Story's Laws, U. S., 1804.

That the lands in contest, and granted by the acts of 1824 and 1836, were of the description of "waste or unappropriated," and subject to the disposition of the United States, when the act of Congress of the 2d of March, 1819, was passed, is not open to controversy, as already stated; nor has it ever been controverted, that whilst the territorial government existed, any restrictions to give private titles were imposed on the federal government: and this in regard to any lands that could be granted. And I had supposed that this right was clearly reserved by the recited compacts, as well as on the general principle that the United States did not part with the right of soil by enabling a state to assume political jurisdiction. That the disclaimer of Alabama, to all right and title in the waste lands, or in the unappropriated lands, lying within the state, excludes her from any interest in the soil, is too manifest for debate, aside from all inference founded on general principles. It follows, if the United States cannot grant these lands, neither can Alabama; and no individual title to them can ever exist. And to this conclusion, as I understand the reasoning of the principal opinion, the doctrine of a majority of my brethren mainly tends. *235]

The assumption is, that flowed lands, including mud-flats, extending to navigable waters, are part of such waters, and clothed with a sovereign political right in the state; not as property, but as a sovereign incident to navigation, which belongs to the political jurisdiction; and being part of state sovereignty, the United States could not withhold it from Alabama. On this theory, the grants of the United States are declared void: conceding to the theory all the plenitude it can claim, still Alabama has only political jurisdiction over the thing; and it must be admitted that jurisdiction cannot be the subject of a private grant.

The present question was first brought directly before this court, (as I then supposed, and now do,) in the cause of *The City of Mobile* v. *Eslava*, in 1840, when my opinion was expressed on it at some length. It will be found in 16 Pet., 247, and was in answer to the opinion of the Supreme Court of Alabama, sent up as part of the record; having been filed pursuant to the statute of that state, found in Clay's Digest, 286, sec. 6. My opinion, then given, has been carefully examined, and so far as it goes, is deemed correct, (except some errors of the press,) nor will the reasons given be repeated.

In *Hallet's* case, 16 Pet., 263, reasons were added to the former opinion. And again, in the case of *Emanuel*, the question is referred to, in an opinion found in 1 How., 101.

In *Pollard's Lessee* v. *Files*, 2 How., 602, the question, whether Congress had power to grant the land now in controversy, was treated as settled. As the judgment was exclusively founded on the act of 1836, (the plaintiff having adduced no other title,) it was impossible to reverse the judgment of the Supreme Court of Alabama on any other assumption than that the act of Congress conferred a valid title. I delivered that opinion, and it is due to myself to say, that it was the unanimous judgment of the members of the court then present.

I have expressed these views in addition to those formerly given, because this is deemed the most important controversy ever brought before this court, either as it respects the amount of property involved, or the principles on which the present judgment proceeds—principles, in my judgment, as applicable to the high lands of the United States as to the low lands and shores.

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*WILLIAM F. CARY AND SAMUEL T. CARY, PLAINTIFFS, *v.* EDWARD CURTIS. [*236

Since the passage of the act of Congress of March 3d, 1839, ch. 82, § 2, which requires collectors of the customs to place to the credit of the treasurer of the United States all money which they receive for unascertained duties or for duties paid under protest, an action of assumpsit for money had and received will not lie against the collector for the return of such duties so received by him.[1]

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[1] APPLIED. *White* v. *Arthur*, 10 Fed. Rep., 85, 92. APPROVED. *Curtis* v. *Fiedler*, 2 Black, 478. CITED. *City of Philadelphia* v. *Collector*, 5 Wall., 732; *Nichols* v. *United States*, 7 Id., 129; *The Collector* v. *Hubbard*, 12 Id., 12; *Bailey* v. *R. R. Co*, 22 Id., 639; *Barney* v. *Watson*, 2 Otto, 452;

In what other modes the claimant can have access to the courts of justice, this court is not called upon in this case to decide.

THIS case came up from the Circuit Court of the United States for the southern district of New York, on a certificate of division in opinion between the judges thereof.

The action was brought in the Circuit Court to recover money paid to Curtis, as collector of the port of New York, for duties. The declaration contained the common money counts, and the defendant pleaded the general issue. The cause was tried at November term, 1842.

The jury found for the plaintiffs, subject to the opinion of the court, among other things,

1. That the plaintiffs paid the sum of $181.75 to the defendants, on the 3d July, 1841, for duties on the goods imported as being raw silk.

2. That the goods on which the duties were demanded and paid, were not raw silk, but a manufactured article.

3. That the money so paid was under a written protest, made at the time of payment.

4. That the money had been paid into the treasury by the defendant, in the month of July, 1841, and before the commencement of this suit.

Upon the argument of this cause, after verdict, several questions arose; among others, the following, viz.:

Whether or not the 2d section of the act of Congress, approved on the 3d day of March, 1839, entitled "An act making appropriations for the civil and diplomatic expenses of government for the year 1839," was a bar to the action?

On this question the opinions of the judges were opposed.

Davies v. *Arthur*, 6 Id., 150. See *Rankin* v. *Hoyt*, 4 How., 332.

In *Elliott* v. *Swartwout*, 10 Pet., 137, an action to recover back money exacted for duties illegally claimed to be due was sustained by the Supreme Court. So in *Bend* v. *Hoyt*, 13 Pet., 263, and in *Greely* v. *Burgess*, 18 How., 413. See *Pullan* v. *Kinsinger*, 2 Abb. (U. S.), 94, 106.

Section 19 of the act of July 13, 1866, the Internal Revenue Act, is constitutional, and applies to all cases where the officer has power to inquire and determine whether the thing assessed by him is liable to taxation, however erroneous his decision of that question may be. *Pullan* v. *Kinsinger*, 2 Abb. (U. S.), 94; *Duluth* v. *Maxwell*, 2 Blatchf., 548, 551. So under the act of March 3, 1839, § 2. (5 Stat. at L., 348.) *Richardson* v. *Curtis*, 3 Blatchf., 385, 389. For decisions under the act of February 26, 1845, (5 Stat. at L., 727,) see *Moke* v. *Barney*, 5 Blatchf., 274; *Chester* v. *Curtis*, 1 Id., 499.

Fees illegally paid have been recovered back from the collector, when paid under protest. *Ogden* v. *Maxwell*, 3 Blatchf., 319; *Knoedler* v. *Schell*, 4 Id., 484.

As to protest, see *Kriesler* v. *Morton*, 2 Curt., 239.

As to the nature of the cause of action, see *Gibson* v. *Stevens*, 3 McLean, 551; *Burrill* v. *City of Boston*, 2 Curt., 590.

For a discussion of the constitutional principles involved in this case, see *Murray* v. *Hoboken Land &c. Co.*, 18 How., 272.

Whereupon, on motion of the plaintiffs by their counsel, it was ordered, that the foregoing state of the pleadings and facts, which is made under the direction of the judges, be certified under the seal of this court, according to the statute in such case made and provided, to the Supreme Court of the United States, to the end, that the question on which the said disagreement has happened may be finally decided.

The cause was argued (in writing) by *Sullivan*, for the plaintiffs in error, and *Nelson*, attorney-general, for the defendant.

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**Sullivan*, for plaintiffs.

This cause comes before the court on a certificate of a division from the Circuit Court of the United States for the southern district of New York.

The plaintiffs, as importers, had a perfect right to have and maintain this action against the defendant upon the facts as found in this cause. *Elliott* v. *Swartwout*, 10 Pet., 137.

The 2d section referred to in the certificate of division (9 Laws U. S., 1012) does not take away this right of action.

Because this right existed at common law, and the statute does not express a clear intent to do so. Bac. Abr. tit. Statute; 19 Vin. Abr., 524, § 125.

Because this right is not taken from the importer by necessary implication; but, on the contrary, the prospective language of this section shows, that Congress contemplated that actions against collectors would and should be brought in future, and sustained, as they had been in all cases of illegal exaction of duties, if paid under sufficient protest. This section provides, that money paid to a collector under protest shall not be held by him to await the result of any litigation in relation to the rate or amount of duty legally chargeable. This is all prospective, and relates to suits which may be brought in future; for there is not a word that limits the effect of the provision in this section to the past or present, but words in the future tense only are used. The section commences with the words, "From and after the passage of this act," and refers only to money thereafter to be received by collectors. The whole tenor of the section imports an intent not to take away the right of litigation for money paid under protest. But if it be urged, that the delegation of a new power to the Secretary of the Treasury to take cognizance of such claims for repayment of duties illegally exacted, imports, by necessary implication, that Congress intended to vest in him exclusively the right of ascertaining the facts in such cases, and of deciding the law thereon, the plaintiffs respect-

ively ask the court to consider in what widely different language such an intent must needs have been expressed. There must have been an express prospective provision of some mode of proving the facts of each case, consistent with the constitutional guaranty of the right of trial by jury; for up to the passing of the act in question, the law had, by necessary implication, and by the known course of judicial proceedings in such cases, recognised this right as the right of all importers paying such duties under protest, and the means of an ulterior decision of all questions of law other than the opinion of the secretary would have been provided; whereas this law, by authorizing the Secretary to repay such illegally exacted duties when he should be satisfied they ought to be repaid, has left open to importers their known and constitutional right of recourse to the tribunals of law when he should not be satis-
*288] fied; so that the true construction of the provision giving *him such a power may be carried into full effect, to the utmost inferrible intention from the terms of this section, quite consistently with leaving to all importers their remedy at law, as well as the privilege of applying to the Secretary at their option.

Because the purpose of this section appears to be two-fold, to wit: the security of public moneys received for duties under protest, and the repayment of them by the Secretary in all cases where he may be satisfied they ought to be repaid, without touching, varying, or altering, in any manner, the right of action by importers against the collector.

Because the collectors have always been required by law to pay over all moneys, without reference to protests. See "An act to regulate the collection of duties on imports and tonnage," Acts of 5th Congress, chap. 128, § 21, (8 Laws U. S., 157,) which provides, *inter alia*, that the "collector shall at all times pay to the order of the officer who shall be authorized to direct the payment thereof, the whole of the moneys which they may respectively receive by virtue of this act; (such moneys as they are otherwise by this act directed to pay, only excepted;)" and it is by virtue, in part, of this very act that the collector demanded and received the money paid in this case.

The money being withdrawn from the collector's hands by law, it would seem unjust that he should be exposed to a judgment and execution thereon; but this section provides that it shall be the duty of the secretary to refund, and thus the collector is indemnified, which is equivalent to a right of retaining money paid under protest, as laid down in the case of *Elliott* v. *Swartwout*, 10 Pet., 154, where the court speak of

the collector's protecting himself by retaining the money or claiming an indemnity; but if not strictly an indemnity, and it should be found in practice that the collector was not reimbursed, he would refrain from exacting duties in doubtful cases until he had the sanction of the Secretary, and his assurance that the money should be repaid upon the recovery of a judgment at law. And this court held, in the case of *Tracy and Balestier* v. *Swartwout*, 10 Pet., 98, 99, that the personal inconvenience to the collector is not to be considered.

The collector is liable for money illegally exacted and paid under protest, although the same may have been turned over to the government under the requirements of the acts of Congress.

In the case of *Townson* v. *Wilson and others*, 1 Campb., 396, Lord Ellenborough says, "if any person gets money into his hands illegally, he cannot discharge himself by paying it over to another;" and this opinion is entitled to more consideration than *nisi prius* decisions usually are, because Lord Ellenborough states, that he had consulted the other judges and that they agreed with him.

In the case of *Sadler* v. *Evans*, or *Lady Winsor's case*, 4 Burr., 1986, it is held, that where notice is given, the [*239 agent may and ought *to be sued, and cannot exonerate himself by payment. This case is cited and approved in *Elliott* v. *Swartwout*.

In the Commentaries of his Honor Judge Story, on Agency, p. 311, § 307, it is laid down, that "where money is obtained from third persons, by public officers, illegally, but under color of office, it may be recovered back again from them if notice has been given by the party, at the time, to the officer, although the money has been paid over to the government." In the case of *Elliott* v. *Swartwout*, 10 Pet., 158, it is held, that "where money is illegally demanded and received by an agent, he cannot exonerate himself from personal responsibility by paying it over to his principal;". and in the case of *Bend* v. *Hoyt*, 13 Pet., 267, it is held that "there is no doubt the collector is generally liable in an action to recover back an excess of duties paid to him, as collector, where the duties have been illegally demanded, and a protest of the illegality has been made at the time of payment, or notice then given that the party means to contest the claim, whether he has paid over the money to the government or not."

If it be objected that the payments here referred to are voluntary, the answer is, that it is evident that the contrary is the fact. If the cases and the remarks in the Commentaries above referred to had been made concerning an ordinary agent,

there might be ground for such an objection; but a collector is the defendant in each case, and government officers are specially referred to in the Commentaries, and if there had been any distinction between the kinds of payments, that distinction would have been referred to, for it was well known to the court, that collectors and other government officers were then compelled by law to pay over all money received by them; and, as has been previously shown, the section in question is no more compulsory than the laws in force at the time of those decisions, and, it follows, that they are controlling and decisive in this case.

The case of *Greenway* v. *Hurd*, 4 T. R., 553, 554, does not apply, because it appears to have been a voluntary payment, and is so decided to be in *Elliott* v. *Swartwout*.

[Of Mr. *Nelson's* argument in reply the reporter has no notes.]

Mr. Justice DANIEL delivered the opinion of the court.

In order to arrive at the answer which should be given to the question certified upon this record, the objects first to be sought for are the intention and meaning of Congress in the enactment of the 2d section of the act of March 3d, 1839, under which the question sent here has been raised. The positive language of the statute, it is true, must control every other rule of interpretation, yet even this may be better understood by recurrence to the known public practice as to matters in *pari materia*, and by the rules of law as previously expounded by the courts, and as applied to and as having influenced that practice. The law as laid down by this *240] court with *respect to collectors of the revenue, in the case of *Elliott* v. *Swartwout*, 10 Pet., 137, and again incidentally in the case of *Bend* v. *Hoyt*, 13 Pet., 263, is precisely that which is applicable to agents in private transactions between man and man, viz.: that a voluntary payment to an agent without notice of objection will not subject the agent who shall have paid over to his principal; but that payment with notice, or with a protest against the legality of the demand, may create a liability on the part of the agent who shall pay over to his principal in despite of such notice or protest. Such was the law as announced from this court, and Congress must be presumed to have been cognisant of its existence; and as the peculiar power ordained by the Constitution to prescribe rules of right and of action for all officers as well as others falling within the legitimate scope of federal legislation, they must be supposed to have been equally cognisant of the effects and tendencies of this court's decisions upon the collection of the public revenue. With this knowledge neces-

sarily presumed for them, Congress enact the 2d section of the act of 1839. It should not be overlooked, for it is very material in seeking for the views of Congress in this enactment, that the court, in the case of *Elliott* v. *Swartwout*, in its reasoning upon the second point submitted to them, say, that the claimant by giving notice to the collector would "put him on his guard," by requiring him not to pay over the money. They farther say, that the collector would, by the same means, be placed in a situation to claim an indemnity. The precise mode in which this protection of the collector was to be accomplished, or his indemnity secured, it is true, the court have not explicitly declared; but it is thought to be no forced construction of their language to explain it as sanctioning a right of retainer in the collector of the funds received by him for the government; for what shield so effectual could he interpose between himself and the cost and hazards of frequent litigation? Indeed, this would appear, according to the opinion of the court, that very protection which justice and necessity would equally warrant. In practice, this retainer has, with or without warrant, been resorted to.

And now let us look to the language of the act of 1839, chap. 82, § 2. "That from and after the passage of this act, all money paid to any collector of the customs, or to any person acting as such, for unascertained duties, or for duties paid under protest against the rate or amount of duties charged, shall be placed to the credit of the treasurer of the United States, kept and disposed of as all other money paid for duties is required by law, or by regulation of the Treasury Department, to be placed to the credit of the treasurer, kept and disposed of; and it shall not be held by said collector or person acting as such, to await any ascertainment of duties, or the result of any litigation in relation to the rate or amount of duty legally chargeable and collectible in any case where money is so paid: but whenever it shall be shown to [*241 the satisfaction of the Secretary of the *Treasury, that in any case of unascertained duties, or duties paid under protest, more money has been paid to the collector, or to the person acting as such, than the law requires should have been paid, it shall be his duty to draw his warrant upon the treasurer in favor of the person or persons entitled to the over-payment, directing the said treasurer to refund the same out of any money in the Treasury not otherwise appropriated." What is the plain and obvious import of this provision, taking it independently and as a whole? It is that all moneys thereafter paid to any collector for unascertained duties, or duties paid under protest, (i. e., with notice of objection by the payer,)

shall, notwithstanding such notice, be placed to the credit of the treasurer, kept and disposed of as all other money paid for duties is required by law to be kept and disposed of; that is, they shall be paid over by the collector, received by the treasurer, and disbursed by him in conformity with appropriations by law, precisely as if no notice or protest had been given or made; and shall not be retained by the collector (and consequently not withdrawn from the uses of the government) to await any ascertainment of duties, or the result of any litigation relative to the rate or amount of duties, in any case in which money is so paid.

This section of the act of Congress, considered independently and as apart from the facts and circumstances which are known to have preceded it, and may fairly be supposed to have induced its enactment, must be understood as leaving with the collector no lien upon, or discretion over, the sums received by him on account of the duties described therein; but as converting him into the mere bearer of those sums to the Treasury of the United States, through the presiding officer of which department they were to be disposed of in conformity with the law. Looking then to the immediate operation of this section upon the conclusions either directly announced or as implied in the decision of *Elliott* v. *Swartwout*, how are those conclusions affected by it? They must be influenced by consequences like the following: That whereas by the decision above mentioned it is assumed that by notice to the collector, or by protest against payment, a personal liability for the duties actually paid, attaches upon, and that for his protection a correspondent right of retainer is created on his part; it is thereby made known (i. e. by the statute) that under no circumstances in future should the revenue be retained in the hands of the collector: that he should in no instance be regarded by those making payments to him as having a lien upon it, because he is announced to be the mere instrument or vehicle to convey the duties paid into his hands into the Treasury: that it is the Secretary of the Treasury alone in whom the rights of the government and of the claimant are to be tested: and that whosoever shall pay to a collector any money for duties, must do so subject to the consequences herein declared. Such, from the 3d day of March, 1839, was the public law of the United States; it *operated as notice to every one; it applied, of course, to every citizen as well as to officers concerned in the regulations of the revenue; and as it removed the implications on which the decision of *Elliott* v. *Swartwout* materially rested, that case cannot correctly control a question arising under a

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different state of the law, and under a condition of the parties also essentially different.

It will not be irrelevant here to advert to other obvious and cogent reasons by which Congress may have been impelled to the enactment in question; reasons which, it is thought, will aid in furnishing a solution of their object. Uniformity of imports and excises is required by the Constitution. Regularity and certainty in the payment of the revenue must be admitted by every one as of primary importance: they may be said almost to constitute the basis of good faith in the transactions of the government; to be essential to its practical existence. Within the extended limits of this country are numerous collection-districts; many officers must be intrusted with the collection of the revenue, and persons much more numerous, with every variety of interest and purpose, are daily required to make payments at the ports of entry. To permit the receipts at the customs to depend on constructions as numerous as are the agents employed, as various as might be the desigus of those who are interested; or to require that those receipts shall await a settlement of every dispute or objection that might spring from so many conflicting views, would be greatly to disturb, if not to prevent, the uniformity prescribed by the Constitution, and by the same means to withhold from the government the means of fulfilling its important engagements. In the view of mischiefs so serious, and with the intention of preventing or remedying them, nothing would seem more probable or more reasonable, we might add more necessary, than that the government should endeavor to devise a plan by which, as far as practicable, to retain its fiscal operations within its own control, thereby insuring that uniformity in practice, enjoined by the theory of the Constitution, and that punctuality which is indispensable to the benefit of all. Such a plan has Congress devised in the act in question. We have no doubts of the objects or the import of that act; we cannot doubt that it constitutes the Secretary of the Treasury the source whence instructions are to flow: that it controls both the position and the conduct of collectors of the revenue: that it has denied to them every right or authority to retain any portion of the revenue for purposes of contestation or indemnity; has ordered and declared those collectors to be the mere organs of receipt and transfer, and has made the head of the Treasury Department the tribunal for the examination of claims for duties said to have been improperly paid.

It has been urged that the clause of the act of 1839 declaring that the monev received shall not be held by any

collector to await any ascertainment of duties, or the result of any litigation in relation *to the rate or amount of duties legally chargeable and collectible in any case where money is so paid; shows that Congress did not mean to deprive the party of his action of assumpsit against the collector: that litigation of that description was still contemplated, and that the only object of the law was to place the money in dispute in the possession of the treasurer, to await a decision, instead of leaving it in the hands of the collector. The court cannot assent to this construction. It will be remembered that the two principal cases in which collectors have claimed the right to retain, have been those of unascertained duties, and of suits brought, or threatened to be brought, for the recovery of duties paid under protest. It is matter of history that the alleged right to retain on these two accounts, had led to great abuses, and to much loss to the public; and it is to these two subjects, therefore, that the act of Congress particularly addresses itself. It begins by declaring that all money received on these accounts shall be paid into the Treasury; and then, in order to show that the collector is not the person with whom any claims for this money are to be adjusted, or who is to be held responsible for it, the act proceeds to declare that the money shall not remain in his hands even if the protest is followed by a suit: that, notwithstanding suit may be brought against him, he shall still pay the money into the Treasury, and that the controversy shall be adjusted with the Secretary. Congress supposed, probably, that a party might choose to sue the collector, as has been done in this instance; but it does not by any means follow, that it was intended to make him liable in the suit, or to give the party the right of recovery against him. The words used go to show, that neither a protest which is mentioned in the first part of the section, nor a suit which is mentioned in the clause of which we are speaking, shall be a pretext or excuse for retaining the money. Suppose the words in relation to a litigation had been omitted, and the law had said, that the collector should not retain the money for any ascertainment of duties, but that the Secretary of the Treasury in that case, as well as in the case of duties paid under protest, should adjust the claim and pay what was really due. The omission supposed would have strongly implied that, if there was litigation, he might retain, and it might be said with much show of reason, that by forbidding him to retain for unascertained duties, but not forbidding him to retain in case of litigation for duties paid under protest, implied that he could not retain for the former but might for the latter. We hold it not a

logical mode of reasoning where the omission of words would evidently lead to a particular conclusion, to argue that their insertion can do the same thing. Besides, the litigation spoken of, and which is said to lead to this result, is a litigation for duties paid under protest, and not for over-payments of unascertained duties. If these words were intended to sanction suits against collectors for the former, why are litigations *for the latter not also countenanced? In- [*244 dependently of this statute, the collector might have been sued for over-payments on unascertained duties as well as for duties paid under protest. And it can hardly be reconciled with reason or consistency that Congress designed to preserve the right of suit in the one case, and to deny it in the other. Yet if these words have the force contended for by the defendant in error, they give the right of action against the collector for duties paid under protest only, leaving the party who has overpaid unascertained and estimated duties, no remedy but that of resorting to the Secretary of the Treasury. It would be difficult to assign any good reason for such a diversity; we think none such was intended, that none such in reality exists, that the law intends merely to declare that if the protest is followed by a suit, the duties in that case as well as in the other, shall be paid into the Treasury and shall not remain in the hands of the collector to abide the result of the suit. The conclusion to which we have come upon this statute is greatly strengthened by the act of Congress of May 31st, 1844, ch. 31, which, in suits brought by the United States for the enforcement of the revenue laws, or for the collection of duties due or alleged to be due on merchandise imported, authorizes a writ of error from this court to the Circuit Courts without regard to the sum in controversy. The object of this law undoubtedly was, to obtain uniformity of decision in regard to the duties imposed. Prior to the act of 1839 there were often differences of opinion in the circuits in the construction of the laws, and in instances too in which the amount in controversy was too small to enable either party to bring them here for revisal by writ of error. It can hardly then be imagined that when Congress was taking measures expressly to secure uniformity of decision and practice in relation to the amount of duties imposed by law, they would have confined the writ of error to cases brought by the United States, when they were of small amount, and refused it in suits against collectors in similar controversies, if they supposed that such suits could still be maintained. Indeed it has heretofore been in this latter form that the amount of duties claimed has been far more frequently contested, than by

suits brought by the United States. And if this form of trying the question had not been intended to be taken away by the act of 1839, there could have been no reason for excluding it from the act of 1844. For the purposes obviously designed by this law, it would have been much more important to the public to have allowed the writ of error in suits against collectors, than in suits instituted by the United States, supposing suits of the former description to be still maintainable; and the omission of such a remedy strongly implies that the legislature supposed such suits could be no longer maintained.

It is contended, however, that the language and the pur-
*245] poses of Congress, if really what we hold them to be declared in the statute *of 1839, cannot be sustained, because they would be repugnant to the Constitution, inasmuch as they would debar the citizen of his right to resort to the courts of justice. The supremacy of the Constitution over all officers and authorities, both of the federal and state governments, and the sanctity of the rights guarantied by it, none will question. These are *concessa* on all sides. The objection above referred to admits of the most satisfactory refutation. This may be found in the following positions, familiar in this and in most other governments, viz.: that the government, as a general rule, claims an exemption from being sued in its own courts. That although, as being charged with the administration of the laws, it will resort to those courts as means of securing this great end, it will not permit itself to be impleaded therein, save in instances forming conceded and express exceptions. Secondly, in the doctrines so often ruled in this court that the judicial power of the United States, although it has its origin in the Constitution, is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.[1] To deny this position would be to elevate the judicial over the legislative branch of the government, and to give to the former powers limited by its own discretion merely. It follows, then, that the courts created by statute must look to the statute as the warrant for their authority;

[1] CITED. *Sheldon* v. *Sill*, 8 How., 449; *Case of the Sewing Machine Cos.*, 18 Wall., 577; *United States* v. *Lee*, 16 Otto, 227.

certainly they cannot go beyond the statute, and assert an authority with which they may not be invested by it, or which may be clearly denied to them. This argument is in no wise impaired by admitting that the judicial power shall extend to all cases arising under the Constitution and laws of the United States. Perfectly consistent with such an admission is the truth, that the organization of the judicial power, the definition and distribution of the subjects of jurisdiction in the federal tribunals, and the modes of their action and authority, have been, and of right must be, the work of the legislature. The existence of the Judicial Act itself, with its several supplements, furnishes proof unanswerable on this point. The courts of the United States are all limited in their nature and constitution, and have not the powers inherent in courts existing by prescription or by the common law.[1]

In devising a system for imposing and collecting the public revenue, it was competent for Congress to designate the officer of the government in whom the rights of that government should be represented in any conflict which might arise, and to prescribe the manner of trial. It is not imagined, that by so doing Congress is justly chargeable with usurpation, or that the citizen is thereby deprived *of his rights. [*246 There is nothing arbitrary in such arrangements; they are general in their character; are the result of principles inherent in the government; are defined and promulgated as the public law. A more striking example of the powers exerted by the government, in relation to its fiscal concerns, than is seen in the act of 1839, is the power of distress and sale, authorized by the act of Congress of May 15th, 1820, (3 Story, 1791,) upon adjustments of accounts by the first comptroller of the Treasury. This very strong and summary proceeding has now been in practice for nearly a quarter of a century, without its regularity having been questioned, so far as is known to the court. The courts of the United States can take cognisance only of subjects assigned to them expressly or by necessary implication; *à fortiori*, they can take no cognisance of matters that by law are either denied to them or expressly referred *ad aliud examen*.

But whilst it has been deemed proper, in examining the question referred to by the Circuit Court, to clear it of embarrassments with which, from its supposed connection with the Constitution, it is thought to be environed, this court feel satisfied that such embarrassments exist in imagination only and not in reality: that the case and the question now before them

[1] APPROVED. *Fisk* v. *O'Neil*, 16 Otto, 280.

present no interference with the Constitution in any one of its provisions, and may be, and should be disposed of upon the plainest principles of common right. In testing these propositions it is proper to recur to the case of *Elliott* and *Swartwout*, and again to bring to view the grounds on which that case was ruled. It was, unquestionably, decided upon principles which may be admitted in ordinary cases of agency, which expressly recognize the right, nay, the duty of the agent to retain, and make his omission so to retain an ingredient in the gravamen or breach of duty, whence his liability and his promise are implied by the law. The language of the court, 10 Pet., 154, is this: "There can be no hardship in requiring the party to give notice to the collector that he considers the duty claimed illegal, and put him on his guard by requiring him not to pay over the money. The collector would then be placed in a situation to claim an indemnity from the government. But if the party is entirely silent, and no intimation is given of an intention to seek repayment of the money, there can be no ground upon which the collector can retain the money, or call upon the government to idemnify him against a suit." Here then the right and the duty of retainer are sanctioned in the officer; without them the notice spoken of would be nugatory—a vain act, which the law never requires. And this right and this duty in the officer, and this injunction of notice to him, must all be understood and are propounded in this decision as principles or precepts of the law, with the knowledge of which each of the parties must stand affected.

The action of assumpsit for money had and received, it is said by Ld. Mansfield, Burr., 1012, *Moses* v. *Macfarlen*, will lie *247] in general whenever the defendant has received money which is the property *of the plaintiff, and which the defendant is obliged by the ties of natural justice and equity to refund. And by Buller, Justice, in *Stratton* v. *Rastall*, 2 T. R., 370, "that this action has been of late years extended on the principle of its being considered like a bill in equity. And, therefore, in order to recover money in this form of action the party must show that he has equity and conscience on his side, and could recover in a court of equity." These are the general grounds of the action as given from high authority. There must be room for implication as between the parties to the action, and the recovery must be *ex æquo et bono*, or it can never be. If the action is to depend on the principles laid down by these judges, and especially by Buller, a case of hardship merely could scarcely be founded upon them; much less could one of injustice or oppression, nor even one which arose from irregularity or indiscretion in the plain-

tiff's own conduct. So far as the liability of agents in this form of action appears to have been considered, the general rule certainly is, that the action should be brought against the principal and not against a known agent, who is discharged from liability by a *bona fide* payment over to his principal, unless anterior to making payment over he shall have had notice from the plaintiff of his right and of his intention to claim the money. The absence of notice will be an exculpation of the agent in every instance. And with regard to the effect of the notice in fixing liability upon the agent, that effect is dependent on the known powers of the agent and the character of his agency. If, for instance, the agent was known to be a mere carrier or vehicle to transfer to his employer the amount received, payment to the agent with such knowledge, although accompanied with a denial of the justice of the demand, would seem to exclude every idea of an agreement express or implied on the part of the agent to refund; and could furnish no ground for this action against the agent who should pay over the fund received to his principal. This doctrine is believed to be sanctioned by the cases of *Greenaway* v. *Hurd*, 4 T. R. 553, of *Coles* v. *Wright*, 4 Taunt., 198, and of *Tope* v. *Hockin*, 7 Barn. & C., 101. 'Tis true that the case in Taunt. and that from Barn. & C., were not instances of payment under protest; but the case from 4 T. R., has this common feature with that before us, that it was an action against an excise officer for duties said to have been illegally collected, in which the plaintiff denied the legality of the demand, though he subsequently paid it. But all three of these cases concur in condemning the harshness of a rule which would subject an agent, who is a mere channel of conveyance or delivery of the amount which might pass through his hands. Neither of these cases was affected by a positive statutory mandate requiring the agent to make payment over to his principal.

Another principle held to be fundamental to this action is this: that there must exist a privity between the plaintiff and defendant; something on which an obligation, an engagement, a promise from *the latter to the former can be [*248 implied; for if such implication be excluded from the relation between the parties by positive law, or by inevitable legal intendment, every foundation for the promise and of the action upon it is destroyed; for none can be presumed or permitted to promise what either law or reason does not warrant or may actually forbid. Thus, where bankers received bills from their foreign correspondents, with directions to pay the amount to the plaintiff, but on being applied to by him refused to do so,

although they afterwards received the amount of these bills it was held, that an action for money had and received would not lie to recover it from them, there being no privity between them and the plaintiff. Lord Ellenborough observed, the defendants might hold for the benefit of the remitter, until by some engagement entered into by themselves with the persons who were the objects of the remittance, they had precluded themselves from so doing; but here, so far from there being such an engagement, they repudiated it altogether. *Williams* v. *Everett*, 14 East, 582. Again, where J., an attorney, who was accustomed to receive dues for the plaintiff, went from home, leaving B., his clerk, at the office; B., in the absence of his master, received money on account of the above dues for the client, which he was authorized to do, and gave a receipt "B., for Mr. J." J. was in bad circumstances when he left home, and never returned. B. afterwards refused to pay the money to the client, and on an action for money had and received against him, it was held not to lie; for the defendant received the money as the agent of his master, and was accountable to him for it; the master, on the other hand, being answerable to the client for the money received by the clerk, there was no privity of contract between the present plaintiff and the defendant: *Stevens* v. *Badcock*, 3 Barn. & A., 354. So in the case of *Sims et al.* v. *Brittain et al.*, 4 Id., 375. A., B., and others, were part-owners of a ship in the service of the East India Company; B. was managing owner, and employed C. as his agent, and C. kept a separate account on his books with B. as such managing owner. In order to obtain payment of a sum of money from the East India Company on account of the ship, it was necessary that the receipt should be signed by one or more of the owners besides the managing owner; and upon a receipt being signed by B. and by another of the owners, C. received £2,000 on account of the ship, and placed it to the credit of B. in his books as managing owner; the part-owners having brought money had and received to recover the balance of that account, held, that C. had received the money as the agent of B., and was accountable to him for it; and that there was no privity between the other part-owners and C., and consequently, that the action was not maintainable. To the same effect are the cases of *Rogers* v. *Kelly*, 2 Campb., 123, and *Edden* v. *Read*, 3 Id., 339, and *Wedlake* v. *Husley*, 1 Crompt. & J., 83. If indeed the defendant
*249] has consented (where he can properly *consent) to hold the money for the use of the plaintiff, he may be liable. And it is conceded, that his consent need not be express, but it must, if not so, rest upon fair and natural implication or legal

intendment. Where such implication or intendment is excluded, forbidden by the position of the parties, by positive law, or by the character of the transaction, consent or any obligation upon which to imply it is entirely removed.

We have thus stated, and will here recapitulate, the principles on which the action for money had and received may be maintained. They are these: 1st. Whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged, by the ties of natural justice and equity, to refund. 2dly. In the case of an agent, where such agent is not notoriously the mere carrier or instrument for transferring the fund, but has the power of retaining, and before he has paid over has received notice of the plaintiff's claim, and a warning not to part with the fund. 3dly. Where there exists a privity between the plaintiff and the defendant. Let the case before us be brought to the test of these rules. The 2d section of the act of Congress declares, first, that from its passage, all money paid to any collector of the customs for unascertained duties, or duties paid under protest against the rate or amount of duties charged, shall be placed to the credit of the treasurer, to be kept and applied as all other money paid for duties required by law. Secondly, that they shall not be held by the collector to await any ascertainment of duties, or the result of any litigation concerning the rate or amount of duty legally chargeable or collectible. And thirdly, that in all cases of dispute as to the rate of duties, application shall be made to the Secretary of the Treasury, who shall direct the repayment of any money improperly charged. This section, as a part of the public law, must be taken as notice to all revenue officers, and to all importers and others dealing with those officers in the line of their duty. There is nothing obscure or equivocal in this law; it declares to every one subject to the payment of duties, the disposition which shall be made of all payments in future to collectors; tells them those officers shall have no discretion over money received by them, and especially that they shall never retain it to await the result of any contest concerning the right to it; and that *quoad* this money the statute has converted those officers into mere instruments for its transfer to the Treasury. With full knowledge thus imparted by the law, can it be correctly understood that the party making payment can, *ex equo et bono*, recover against the officer for acting in literal conformity with the law, converting thereby the performance of his duty into an offence; or that upon principles of equity and good conscience, an obligation and a promise to refund shall be implied against the express mandate of the law? Such a

presumption appears to us to be subversive of every rule of right. The more correct inference seems to be
*250] that payment under such circumstances *must, *ex equo et bono*, nay, *ex necessitate*, and in despite of objection made at the time, be taken as being made in conformity with the mandate of the law and the duty of the officer, which exclude not only any implied promise of repayment by the officer, but would render void an express promise by him, founded upon a violation both of the law and of his duty. The claimant had his option to refuse payment; the detention of the goods for the adjustment of duties, being an incident of probable occurrence, to avoid this it could not be permitted to effect the abrogation of a public law, or a system of public policy essentially connected with the general action of the government. The claimant, moreover, was not without other modes of redress, had he chosen to adopt them. He might have asserted his right to the possession of the goods, or his exemption from the duties demanded, either by replevin, or in an action of detinue, or perhaps by an action of trover, upon his tendering the amount of duties admitted by him to be legally due. The legitimate inquiry before this court is not whether all right of action has been taken away from the party, and the court responds to no such inquiry. The question presented for decision, and the only question decided, is whether, under the notice given by the statute of 1839, payments made in despite of that notice, though with a protest against their supposed illegality, can constitute a ground for that implied obligation to refund, and for that promise inferred by the law from such obligation, which are inseparable from, and indeed are the only foundation of, a right of recovery in this particular form of action. And here is presented the answer to the assertion, that by the act of 1839, or by the construction given to it by this court, the party is debarred all access to the courts of justice, and left entirely at the mercy of an executive officer. Neither have Congress nor this court furnished the slightest ground for the above assertion.

But the objection to a recovery in this action may be farther extended, upon grounds which to the court appear to be insuperable. We all know that this action for money had and received is founded upon what the law terms an implied promise to pay what in good conscience the defendant is bound to pay to the plaintiff. It being in such case the duty of the defendant to pay, the law imputes to him a promise to pay. This promise is always charged in the declaration, and must be so charged in order to maintain the

action. It was upon this principle that the action for money had and received was sustained in the case of *Elliott* v. *Swartwout*. There money had been taken by the collector for duties which were not imposed. This money lawfully belonged to the plaintiff; it was the duty, therefore, of the collector to pay it back to him. The collector was not bound to pay it to the treasurer, for the law did not command this disposition of it. It did not belong to the United States, who had no right, therefore, to demand it of him, and could not have recovered it against him, in a suit, if he had paid it back to the true *owner. It being the duty of the collector to return what he had unlawfully taken, the law implied on his part a promise to do so; and on this implied promise, arising or inferred from a duty imposed upon him, the action was maintained. The protest and notice were to him of no farther importance than to warn him to hold over, and to take away an excuse he might otherwise have had from payment to his principal. It was his duty, as the law then stood, not to pay over, but to pay back to the party from whom he had collected without legal authority, when warned that this party should look to him for reimbursement, and not to his principal. But the law never implies a promise to pay, unless duty creates the obligation to pay; and more especially it never implies a promise to do an act contrary to duty or contrary to law. Now, under the statute of 1839, if the collector receives money, though for duties not due, it is nevertheless made his duty to pay it into the Treasury, to be repaid there, if the party claiming is found to be entitled to it. And the question here is, will the law imply a promise from the collector to do that which is contrary to his official duty, contrary to the command of a positive statute? If it will not, then the action of assumpsit for money had and received will not lie in this case. [*251

Moreover, the law will never imply a promise where it would be unjust to the party to whom it would be imputed, and contrary to equity so to imply it. Suppose the collector should not, as directed by law, pay the money into the Treasury, the United States might undoubtedly maintain an action against him for money had and received to their use. Because it being his duty to do so, the law would imply a promise to pay it. Can the law at the same time imply a promise to pay it elsewhere or to another, and thus burden the collector with the double obligation of paying to the government, and also to one claiming in adversary interest? If suits were instituted against him by both parties, and were standing for trial at the same time, would both be entitled to a recovery, and would the law imply promises to both, promises to pay double

the amount received? We think not; and as the law in positive terms directs payment to be made into the Treasury, there can be no judicial implication contrary to law, nor that the collector will pay to another what the law directs him to pay to the United States; and no judicial implication which would require him to be guilty of an act of official misconduct, or a breach of his duty to the public. If the law implies a promise to pay back to the party, then it must be the duty of the collector to do so as soon as it is demanded. If the money may be recovered of him by suit, then he would be justified in paying without suit, yet if he does so pay, he not only violates a duty imposed by law, but may be compelled to pay over again to the government, as for so much money had and received to its use. We think the law can never imply a promise which
*252] must be unjust and oppressive in its results to the party, or contrary to his duty as *a public officer; and there being no implied promise, therefore in this case the action for money had and received cannot be maintained. It is perfectly clear to the court that, under the act of 1839, the United States have, by express law, a right to demand the money from the collector, and to recover it in an action for money had and received, even if that officer had paid it over to the person from whom he had received it; and we say with confidence that in the multitude of cases that have been decided in relation to that action, there is not one in which it has been held that money could be recovered from a defendant when his voluntary payment of it would leave him still liable to an action for the same money by another.

We deem it unnecessary to examine farther the grounds stated in the second and third heads of inquiry, as forming the foundation of the action for money had and received; or to bring to a particular comparison with those grounds the law and the facts of this case, as presented upon the record. The illustrations given under the first head embrace all that is important under the remaining divisions, with respect to the nature of the demand and the position of the parties. Those illustrations establish, in the view of the court, that, so far is the defendant from being obliged, by the ties of natural equity and justice, to refund to the plaintiff the money received for duties, that, on the contrary, under that notice of the law which all must be presumed to possess, the payment must be understood as having been made with knowledge of the parties that the right of retaining or of refunding the money did not exist in the defendant; that the money by law must pass from him immediately upon its receipt; that payment to him was in legal effect payment into the Treasury; that notice to him

was, under such circumstances, of no effect to bind him to refund; that as the collector, since the statute, had power neither to retain or refund, there could, as between him and the plaintiff, arise no privity nor implication, on which to found the promise raised by the law, only where an obligation to undertake or promise exists; and that, therefore, the action for money had and received could not, in this case, be maintained, but was barred by the act of Congress of 1839.

Mr. Justice STORY.

I regret exceedingly being compelled by a sense of duty to express openly my dissent from the opinion of the majority of the court in this case. On ordinary occasions my habit is to submit in silence to the judgment of the court where I happen to entertain an opinion different from that of my brethren. But the present case involves, in my judgment, doctrines and consequences which, with the utmost deference and respect for those who think otherwise, I cannot but deem most deeply affecting the rights of all our citizens, and calculated to supersede the great guards of those rights intended to be secured by the Constitution through the instrumentality of the [*253 *judicial power, state or national. The question, stripped of all formalities, is neither more nor less than this: Whether Congress have a right to take from the citizens all right of action in any court to recover back money claimed illegally, and extorted by compulsion, by its officers under color of law, but without any legal authority, and thus to deny them all remedy for an admitted wrong, and to clothe the Secretary of the Treasury with the sole and exclusive authority to withhold or restore that money according to his own notions of justice or right? If Congress may do so in the present case, in the exercise of its power to levy and collect taxes and duties, and thus take away from all courts, state and national, all right to interpret the laws for levying and collecting taxes and duties, and to confide such interpretation to one of its own executive functionaries, whose judgment is to be at once summary and final, then I must say, that it seems to me to be not what I had hitherto supposed it to be: a government where the three great departments, legislative, executive, and judicial, had independent duties to perform each in its own sphere; but the judicial power, designed by the Constitution to be the final and appellate jurisdiction to interpret our laws, is superseded in its most vital and important functions. I know of no power, indeed, of which a free people ought to be more jealous, than of that of levying taxes and duties; and yet if it is to rest with a mere executive func

tionary of the government absolutely and finally to decide what taxes and duties are leviable under a particular act, without any power of appeal to any judicial tribunal, it seems to me that we have no security whatsoever for the rights of the citizens. And if Congress possess a constitutional authority to vest such summary and final power of interpretation in an executive functionary, I know no other subject within the reach of legislation which may not be exclusively confided in the same way to an executive functionary; nay, to the executive himself. Can it be true that the American people ever contemplated such a state of things as justifiable or practicable under our Constitution? I cannot bring my mind to believe it; and, therefore, I repeat it, with the most sincere respect for my brethren, who entertain a different opinion, I deny the constitutional authority of Congress to delegate such functions to any executive officer, or to take away all right of action for an admitted wrong and illegal exercise of power in the levy of money from the injured citizens. I am further of opinion, as I shall endeavor presently to show, that Congress never had contemplated passing any such act, and that the act of the 3d of March, 1839, ch. 82, § 2, neither requires nor in my humble judgment justifies such an interpretation.

What is the real question presented, upon the division of opinion in the Circuit Court, for the consideration of this court? It is not whether an action to recover back the money
*254] illegally claimed and paid to the collector for duties, in order to obtain possession of the *goods by the owner under a protest they were not legally due, would lie in the Circuit Court, for no such question arises on the record, and it is incontrovertible and uncontroverted, that if any such action would lie, it would lie in the national courts as well as in the state courts. It is not whether Congress may limit, restrain, modify, or even take away the right to sue in the national courts, in cases like the present, or, indeed, in any other class of cases not constitutionally provided for, but it is simply whether the act of Congress of the 3d of March, 1839, ch. 82, § 2, is a bar to such an action in any court, state or national. If it is a good bar in one court, it is good in all courts under the provisions of that act. If Congress have a right to say, and have said, under the provisions of that act, that no officers of the customs shall be liable to any action for money extorted by him under color of his office without authority and against law, then these provisions are equally applicable to all courts, and furnish the rule of decision for all. And Congress have an equal right to apply a like provision to all other acts of all other officers done under color of office,

and the trial by jury may, in suits at common law, be completely taken away in all such cases, and the right of final decision be exclusively vested in the executive, or in any other public functionary, at the pleasure of Congress.

Now, how stands the common law on this very subject? It is that an action for money had and received lies in all cases to recover back money which a person pays to another in order to obtain possession of his goods from the latter, who withholds them from him upon an illegal demand, or claim, *colore officii*, and thus wrongfully receives and withholds the money. Such a payment is in no just sense treated in law as a voluntary payment, but it is treated as a payment made by compulsion, and extorted by the necessities of the party who pays it. Such is the doctrine of the common law as held in England, with a firm and steady hand, against all the claims of prerogative, and it is maintained in our day as the undeniable right of every Englishman, against the unjust and illegal exactions of officers of the crown. Mr. Justice Bayley laid down the general principle with great exactness in *Shaw* v. *Woodcock*, 7 Barn. & C., 73, 84, and said: "If a party has in his possession goods or other property belonging to another, and refuses to deliver such property to that other unless the latter pays him a sum of money which he has no right to receive, and the latter, in order to obtain possession of his property, pays that sum, the money so paid is a payment made by compulsion, and may be recovered back." In *Irving* v. *Wilson*, 4 T. R., 485, the doctrine was applied to the very case of the acts of an officer of the excise or customs. Upon that occasion Lord Kenyon emphatically said: "The revenue laws ought not to be made the means of oppressing the subject. If goods liable to a forfeiture be forfeited, the officer is to seize them for the king, but he is not permitted to abuse the duties of his station, *and to make it a mode of extortion." There are many other authorities leading to the same result, but it is unnecessary to cite them, since the very point that an action for money had and received lies against a collector of the customs to recover back money demanded by and paid to him, *colore officii*, upon goods imported, for duties not legally due thereon, has been, upon the most solemn deliberation, held by this court in the cases of *Elliott* v. *Swartwout*, 10 Pet., 137, and *Bend* v. *Hoyt*, 13 Id., 263, 267. [*255

It is an entire mistake of the true meaning of the rule of the common law, which is sometimes suggested in argument, that the action of assumpsit for money had and received is founded upon a voluntary, express, or implied promise, of the defendant, or that it requires privity between the parties *ex*

contractu to support it. The rule of the common law has a much broader and deeper foundation. Wherever the law pronounces that a party is under a legal liability or duty to pay over money belonging to another, which he has no lawful right to exact or retain from him, there it forces the promise upon him *in invitum* to pay over the money to the party entitled to it. It is a result of the potency of the law, and is in no shape dependent upon the will or consent or voluntary promise of the wrongful possessor. The promise is only the form in which the law announces its own judgment upon the matter of right and duty and remedy; and under such circumstances any argument founded upon the form of the action, that it must arise under or in virtue of some contract, is disregarded, upon the maxim *qui hæret in litera, hæret in cortice*. Hence, it is a doctrine of the common law, (as far as my researches extend,) absolutely universal, that if a man, by fraud, or wrong, or illegality, obtains, or exacts, or retains money justly belonging to another, with notice that the latter contests the right of the former to receive, or exact, or retain it, an action for money had and received lies to recover it back; and it is no answer for the wrongdoer to say that he has paid it over to his superior; for although as between the wrongdoer and his superior, the maxim may well apply, *respondeat superior*, yet the injured party is not bound to seek redress in that direction; and *à fortiori*, &c., he is not so bound, where, as in the case of the government, the superior is not suable. That would be a mere mockery of justice. And this is the very doctrine affirmed in its full extent by this court in the cases of *Elliott* v. *Swartwout*, 10 Pet., 137, and *Bend* v. *Hoyt*, 13 Id., 263, 267.

An action for money had and received being then the known and appropriate remedy of the common law, applied to cases of this sort, to protect the subject from illegal taxation, and duties levied by public officers, what ground is there to suppose that Congress could intend to take away so important and valuable a remedy, and leave our citizens utterly without any adequate protection? It is said, that circuitously another remedy may be found. The answer is, that if
*256] *Congress have taken away the direct remedy, the circuitous remedy must be equally barred. But in point of fact no other judicial remedy does exist or can be applied. If the collector is not responsible to pay back the money, nobody is. The government itself is not suable at all; and certainly there is no pretence to say that the Secretary of the Treasury is suable therefor. Where then is the remedy which is supposed to exist? It is an appeal to the Secretary of

the Treasury for a return of the money, if in his opinion it ought to be returned, and not otherwise. No court, no jury, nay, not even the ordinary rules of evidence, are to pass between that officer and the injured claimant, to try his rights or to secure him adequate redress. Assuming that the Secretary of the Treasury will always be disposed to do what he deems to be right in the exercise of his discretion, and that he possesses all the qualifications requisite to perform this duty, among the other complicated duties of his office—a presumption which I am in no manner disposed to question—still it removes not a single objection. It is, after all, a substitution of executive authority and discretion for judicial remedies. Nor should it be disguised, that upon so complicated a subject as the nature and character of articles made subject to duties, grave controversies must always exist (as they have always hitherto existed) as to the category within which particular fabrics and articles are to be classed. The line of discrimination between fabrics and articles approaching near to each other in quality, or component materials, or commercial denominations, is often very nice and difficult, and sometimes exceedingly obscure. It is the very case, therefore, which is fit for judicial inquiry and decision, and falls within the reach of that branch of the judicial power given by the Constitution, where it is declared "that the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties, &c." If then the judicial power is to extend to all cases arising under the laws of the United States, upon what ground are we to say that cases of this sort, which are eminently "cases arising under the laws," and of a judicial nature, are to be excluded from judicial cognisance, and lodged with an executive functionary?

Besides, we all know that, in all revenue cases, it is the constant practice of the Secretary of the Treasury to give written instructions to the various collectors of the customs as to what duties are to be collected under particular revenue laws, and what, in his judgment, is the proper interpretation of those laws. I will venture to assert that, in nineteen cases out of twenty of doubtful interpretation of any such laws, the collector never acts without the express instructions of the Secretary of the Treasury. So that in most, if not in all cases where a controversy arises, the Secretary of the Treasury has already pronounced his own judgment. Of what use then, practically speaking, is the appeal to him, since he has already given his decision? Further, it is well known, and the annals of *this court as well as those of the other [*257

courts of the United States establish in the fullest manner, that the interpretations so given by the Secretary of the Treasury have, in many instances, differed widely from those of the courts. The Constitution looks to the courts as the final interpreters of the laws. Yet the opinion maintained by my brethren does, in effect, vest such interpretation exclusively in that officer.

These considerations have led me to the conclusion that it never could be the intention of Congress to pass any statute, by which the courts of the United States, as well as the state courts, should be excluded from all judicial power in the interpretation of the revenue laws, and that it should be exclusively confided to an executive functionary finally to interpret and execute them—a power which must press severely upon the citizens, however discreetly exercised, and which deeply involves their constitutional rights, privileges, and liberties. The same considerations force me, in all cases of doubtful or ambiguous language admitting of different interpretations, to cling to that which should least trench upon those rights, privileges, and liberties, and *à fortiori* to adopt that which would be in general harmony with our whole system of government.

And this leads me to say that, after the most careful examination of the 2d section of the act of 1839, ch. 82, I have not been able to find any ground to presume that Congress ever contemplated any thing contained in that section to be a bar to the present action. I look upon that section as framed for a very different object, an object founded in sound policy and to secure the public interest. It was to prevent officers of the customs from retaining (as the habit of some had been) large sums of money in their hands received for duties, upon the pretence that they had been paid under protest, and thus to secure in the hands of the officers a sufficient indemnity for all present as well as future liabilities to the persons who had paid them. By this means large sums of money were withheld from the government, and there was imminent danger that severe losses might thus be sustained from the defalcation of those officers, and the public revenue might be thus appropriated to the personal business or speculating concerns of the officers. If actions should be brought and judgment obtained against such officers for the repayment of any of such duties, it was plain that the government would be bound to indemnify them, especially if they had acted under instructions from the Treasury Department. On the other hand, the government, being in possession of the money, would hold it in the mean time as a deposit to await events, and to refund

the same if in the due administration of the law it was adjudged that it ought to be refunded. Such, in my judgment, was the object and the sole object of the section, and it seems to me in this view to be founded in a wise protective policy.

*With this exposition in our view, let us examine the language of the section. It is as follows: "That from [*258 and after the passage of this act, all money paid to any collector of the customs or to any person acting as such, for unascertained duties or for duties paid under protest against the rate or amount of duties charged, shall be placed to the credit of the treasurer of the United States, kept and disposed of as all other money paid for duties is required by law or by regulation of the Treasury Department to be placed to the credit of said treasurer, kept and disposed of; and shall not be held by the said collector or person acting as such to await any ascertainment of duty, or the result of any litigation in relation to the rate or amount of duty legally chargeable and collectible in any case where money is so paid." Now, pausing here, it seems to me that the clause is plainly and merely directory to the collector or person acting as such, pointing out his duty and requiring him to pass the money so paid to the credit of the government as soon as it is received. Nothing is here said as to the rights of third persons, who pay the money for duties; no declaration is made that the collector shall not be liable to any action for such duties, if not legally demandable or payable, or that the collector or such other person shall not be liable to refund the same. And yet, if such had been the intention of Congress, it seems to me incredible that a provision to this effect should not have been found in the act. But further; not only is there a total absence of any such provision, but there is positive evidence that Congress contemplated that there would be suits brought against the collectors and other persons for the repayment of such duties, and, accordingly, as we see, the money is not to be retained by them "to await any ascertainment of duties or the result of any litigation." The language is not limited to the result of past or pending litigation, but it equally applies to future litigation; in short, any litigation, without any limitation as to time, and indeed to be co-extensive with the permanent prospective operation of the act. If then, there is in this clause no positive or implied bar to any action provided for, and if the clause is perfectly satisfied by deeming it to be what it professes on its face to be, a regulation addressed to the collectors and other persons collecting duties, and directory to them, let us see if the subsequent clause, which contains the residue of the section, either enlarges, or qualifies, or

repels the inferences drawn from the preceding clause. This clause is, "But whenever it shall be shown to the satisfaction of the Secretary of the Treasury, that, in any case of unascertained duty or duties paid under protest, more money has been paid to the collector or other person acting as such, than the law requires should have been paid, it shall be his duty to draw his warrant upon the treasurer in favor of the person or persons entitled to the over-payment, directing the said treasurer to refund the same out of any money in the Treasury not otherwise appropriated."

*259] *This is the whole of the clause, and, unless I am greatly deceived in its purport and effect, not one word is to be found therein which bars the party who has paid the money from his right of action against the collector or other persons acting as such to recover back the money illegally claimed, or which compels such party to make his application or appeal solely to the Secretary of the Treasury for redress, or gives to the latter exclusive power, jurisdiction, and final arbitrament in the premises. The true object of this clause seems to be precisely what its language imports, to give the Secretary of the Treasury a power which he did not previously possess, to draw from the Treasury money which had been overpaid for duties when he was satisfied of such over-payment, upon the application of the party interested. It was not to be compulsive on the party, that he should so apply, but he had an option to apply to the Secretary, to save the delay and expense of a protracted litigation, if the Secretary should grant him the desired relief. It would also diminish the necessity of applications to Congress for the repayment of money which had been illegally paid for duties, by enabling the Secretary to draw his warrant upon the Treasury for the amount; which relief, when the money had been paid into the Treasury, could not before be obtained except by means of an act of Congress. It was, therefore, an auxiliary provision to the general rights of action secured to the party by the common law, and not in extinguishment or suspension of it. Whether the clause clothed the Secretary also with authority to draw a warrant in favor of the party, if he recovered back the money in a suit at law against the collector, is a matter which might, upon the strict words of the clause, admit of some doubt, since the case provided for is only where the over-payment shall be shown to the satisfaction of the secretary, and not where it is a result of a judgment at law. But a liberal construction might embrace such a case also, as within the intent, if not strictly within the words. But be this as it may, it is manifest to my mind, with all deference to the judgment of

others, that the affirmative power thus given by this clause to the Secretary, cannot be construed to exclude the right of the party to his remedy at the common law without a violation of the known rules of interpretation, by adding important and material language which the legislature has not used, and incorporating provisions which neither the words nor the professed objects of the section require.

Nor am I able to perceive any grounds upon which a different interpretation can be maintained, unless it be, that it would be a hardship upon the collector to require him to pay money over to the government which he might be compelled again to pay to the party from whom he had illegally demanded it. One answer to this suggestion is, that he cannot complain, because it is his own choice to hold an office to which such a duty or responsibility is attached, and if he elects to hold it, he ought to take it *cum onere*. *Another and [*260 conclusive answer is, that he has a perfect right of indemnity from the government; nor can it be doubted that the government will always indemnify all its officers for acts done by its orders and demands made under its authority. On the other hand, an extreme hardship would be thrown upon the injured party, whose money is taken from him against his will by color of office, and against his right, if his common law remedy is swept away; for then he can have no means of redress, and no indemnity, since he has resisted the demands of the government and asserts an adversary interest.

Nor is it any ground of excuse, (as has been already suggested,) in case of money paid by compulsion, that the officer has paid over the money to his principal; and in this respect it differs from the case of a voluntary payment. This distinction was taken and acted upon in the case of *Snowden* v. *Davis*, 1 Taunt., 358, where money had been paid to a bailiff under a threat of a distress by an excess of authority, and the money had been paid over by him to the sheriff, and by the latter into the exchequer. And the same doctrine was fully recognised and confirmed by this court upon the most solemn consideration in *Elliott* v. *Swartwout*, 10 Pet., 137, after a full review of all the leading authorities.

Upon the whole my opinion is, that the question propounded by the Circuit Court upon the division of opinion of the judges in that court, ought to be answered in the negative, that the 2d section of the act of 3d of March, 1839, ch. 82, was no bar to the action.

Mr. Justice McLEAN.

This suit was brought to recover from the defendant, col-

lector of the customs, an excess of duties exacted by him of the plaintiffs against law. And on the trial in the Circuit Court the judges were divided on the question, "whether the act of the 3d of March, 1839, was a bar to the action." This point has been certified to this court.

The 2d section of the above act provides, "that from and after the passage of this act, all money paid to any collector of the customs, or to any person acting as such, for unascertained duties, or for duties paid under protest against the rate or amount of duties charged, shall be placed to the credit of the treasurer of the United States, kept and disposed of as all other money paid for duties is required by law or by regulation of the Treasury Department to be placed to the credit of the said treasurer, kept and disposed of; and shall not be held by the said collector, or person acting as such, to await any ascertainment of duties or the result of any litigation in relation to the rate or amount of duty legally chargeable and collectible in any case where money is so paid; but whenever it shall be shown to the satisfaction of the Secretary of the Treasury, that, in any case of unascertained duties or duties paid under protest, more *money has been paid to the collector or person acting as such than the law requires should have been paid, it shall be his duty to draw his warrant upon the treasurer in favor of the person or persons entitled to the over-payment, directing the said treasurer to refund the same out of any money in the Treasury not otherwise appropriated."

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In the case of *Elliott* v. *Swartwout*, 10 Pet., 137, and in *Bend* v. *Hoyt*, 13 Id., 263, this court held, that illegal duties exacted by the collector were recoverable from him, where paid under protest, by the importer, in an action of assumpsit. This doctrine is not questioned in this country or in England. Has the 2d section of the act above cited changed the law in this respect? A majority of the judges have decided in the affirmative, and that that act constitutes a bar to an action in such a case. I dissent from the opinion of the court.

The above section, in my judgment, so far from taking away the legal remedy, expressly recognises it. The collector is required, "from and after the passage of the act," to pay over to the treasurer the moneys in his hands, and not "to await any ascertainment of duties, or the result of any litigation in relation to the rate or amount of duty legally chargeable," &c. Now, if Congress intended by this section to withdraw this subject from the courts, and vest the exclusive right to decide the matter in the Secretary of the Treasury, could they have used this language? The law was not to operate upon the

past, but upon the future acts of the collector. And I ask in sober earnestness, whether the collector could be required to pay over money, "and not await the result of a litigation," as "to the amount of duties legally chargeable," if the intention was to prohibit such litigation. I use the words of the section; and the words of the section alone, as I think, are conclusive as to the intention of Congress. The collector must pay over the money, and not retain it until the termination of a suit. Does this take away the right to bring a suit? Such an inference, it seems to me, would be as exceptionable in logic as in law.

From the proceedings of this court we know that collectors of the customs after their removal from office or the expiration of their term, and sometimes while in office, under the pretext of indemnifying themselves against suits for the exaction of illegal duties, were in the practice of withholding from the Treasury large sums of money. And it was to remedy this evil, that the above law was passed. As to the remission of duties illegally charged, it vested in the secretary no new powers; but it authorizes him, where the excess of duty has been paid into the Treasury, to draw it out by a warrant, and pay it over to the person entitled to receive it. By the 21st section of the Duty Act of 1799, (1 Story, 592,) the collectors "were required, at all times, to pay to the order of the proper officer the whole of the moneys which they may respectively receive, &c., and shall once in three months, or oftener, if required, transmit their accounts," &c. Now, it is [*262 known from public documents and from cases before this court, that the Secretary of the Treasury has, for a long time before the act of 1839, required the collector of New York to pay over moneys received by him, weekly or at short intervals. And can it be pretended that the act of 1799, under the instructions of the Secretary of the Treasury, was not as binding upon collectors as the act of 1839? In a legal point of view the liability of a collector was the same for illegal duties received by him, whether paid into the Treasury under the one law or the other.

It is said that the law cannot raise a promise to pay by an officer, where it requires him to pay the same money into the Treasury. The action is founded on the illegality of the transaction. None other than legal duties are payable to the government; and where an officer by his own volition, or acting under the instructions of his superior, demands a higher duty than the law authorizes, he is guilty of a wrong which his instructions cannot justify. And having done this, can it be contended, that by paying over moneys so obtained he can

escape the legal consequence of his unlawful act? Where one person obtains money illegally from another, is he not bound in conscience to return it? And may not an action of assumpsit be sustained for the recovery of the money? In such an action the question is, whether the defendant has received money which he is bound in good conscience to pay to the plaintiff. Now, if the defendant, as collector, exacted a higher duty of the plaintiffs than the law authorized, is he not bound in conscience to return the excess? But it is said that he has paid it over to the Treasury of the United States, in pursuance of the act of 1839, and that this is a bar to the action. Why has not this bar been set up under the act of 1799? By that act the collector, when ordered by the Secretary of the Treasury, was as much bound to pay over the money in his hands into the Treasury as under the act of 1839. And yet for forty-four years such a defence has not been thought of. It has never been supposed that the payment of the money into the Treasury exonerated the collector. He has violated the law, and he is answerable for that violation. This must be the case, unless, in the language of this court in the case of *Elliott* v. *Swartwout* above cited, "the broad proposition can be maintained, that no action will lie against a collector to recover back an excess of duties paid him, but that recourse must be had to the government for redress. Such a principle," the court say, "would be carrying an exemption to a public officer beyond any protection sanctioned by any principles of law or sound public policy."

In *Townson* v. *Wilson et al.*, 1 Campb., 396, Lord Ellenborough says, "If any person gets money into his hands illegally, he cannot discharge himself by paying it over to another." The same doctrine is held in *Sadler* v. *Evans*, 4 Burr., 1986. And this court in the above case of *Elliott* v. *Swartwout* say, "It may be assumed as the *settled doctrine of the law, that where money is illegally demanded and received by an agent, he cannot exonerate himself from responsibility by paying it over to his principal, if he has had notice not to pay it over. A notice not to pay over the money to the principal, it is contended, presupposes a right in the agent to retain it. No such inference could arise under the act of 1799, nor can it be made under the present law. The notice should induce the collector to reconsider his act, and if found to have been against law to correct it. But it is said, he may have acted under the orders of the Secretary of the Treasury. Suppose he did, would that justify or excuse an illegal act? I will answer this in the language of this court in the case last cited: "Any instructions from the Treasury

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Department could not change the law or affect the rights of the plaintiff. He, the collector, was not bound to take and adopt that instruction. He was at liberty to judge for himself, and act accordingly." And in *Tracy* v. *Swartwout*, 10 Pet., 99, this court say, "that the personal inconvenience of the collector is not to be considered." When acting under instructions the government is bound to indemnify him. In my judgment the act of 1839 interposes no bar to this action.

But there is another aspect in which this case must be considered. Feeling, as I do, an unfeigned respect for the opinion of the judges who differ from me, yet I cannot, without concern, look at the consequences of the principle established in this case. The right of a citizen to resort to the judicial tribunals of the country, federal or state, for redress for an injury done by a public officer, is taken away by the construction of an act of Congress, which, in my judgment, bears no such construction. But I will take higher ground, and say, that Congress have no constitutional power to pass such an act as the statute of 1839 is construed to be by this decision.

By the 2d section of the 3d article of the Constitution of the United States, the judicial power extends to all cases in law and equity arising under the Constitution and laws of the union. And by the 7th section of the amendments to the Constitution it is provided, that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

The act of 1839, in my judgment, does not conflict with either of the above constitutional provisions. But if it take away the right of the citizen to sue in a court of law for the injury complained of, as construed by my brethren, then it is in direct conflict with both of the above provisions.

In a matter of private right it takes from the judiciary the power of construing the law, and vests it in the Secretary of the Treasury; the executive officer under whose sanction or instruction the wrong complained of was done.

[*264 *And in the second place it takes from the citizen the right of trial by jury, which is expressly given to him by the Constitution.

I again repeat that Congress have not done this, nor did they intend to do it by the act of 1839. But the act is so construed by the decision just pronounced. Under this view, I feel myself bound to consider the principle established by the court, and to speak of its consequences.

That the act, as construed, is in direct conflict with the above provisions of the Constitution, is so palpable that it seems to me no illustration could make it clearer.

The right to construe the laws in all matters of controversy, is of the very essence of judicial power. Executive officers who are required to act under the laws, of necessity, must give a construction to them. But their construction is not final. When it operates injuriously to the citizen, he may, by any and every possible means through which it may be brought before the courts, have the construction of the law submitted to them, and their decision is final.

But the court say, that the plaintiffs in this case cannot seek redress for the injury complained of, by an action at law, but, under the act of 1839, are referred to the Secretary of the Treasury; an executive officer, who has prejudged the case, who can exercise neither the forms nor the functions of a judicial officer; who acts summarily, without a jury, and from whose judgment there is no appeal. The case turns upon facts; facts properly triable by a jury. The question is, whether the articles on which the duties have been assessed, are such articles as under the law are liable to be thus taxed. This is a question most fit to be answered by a jury of merchants, under the instructions of a court of law. The plaintiffs allege that the duty was not authorized by law, but to obtain possession of their goods, they were compelled to pay it, protesting against the right of the government. And they brought an action at law to recover from the collector the excess of duty paid. This course had been sanctioned by previous decisions. It was, in fact, the only effectual course they could take to obtain possession of their goods. A tender of the legal duty, and a replevin, if it would lie, involved the necessity of security for the return of the goods which, if in the power of the importers, might not have been convenient to them. But a replevin is expressly prohibited in such a case by the act of 2d March, 1833.

The question arises on the facts stated. Illegal duties were demanded by the collector and paid to him by the plaintiffs, before they could obtain their goods; and the question is, has their remedy at law been cut off by the statute of 1839? This is a taxing power; the most delicate power that is exercised by the government. It reaches the concerns of the citizen, and takes from him a part of his property for purposes of revenue. The tax should be judicious, and the mode of collecting it should be specially guarded. Care *should be taken not to infringe private right in making this public exaction. But, especially, where, in this respect, a wrong has been done to the citizen, the courts should be open to him. His remedy should be without obstruction. But my brethren say that the act of 1839 takes away from the plaintiff all

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remedy except an appeal to the Secretary. The state courts as well as the federal are closed against the injured party.

The able men who laid the foundation of this government saw that, to secure the great objects they had in view, the executive, legislative and judicial powers, must occupy distinct and independent spheres of action. That the union of these in one individual or body of men constitutes a despotism. And every approximation to this union partakes of this character.

What though no positive injustice be done to the plaintiffs in this case; is that any reason why the great principle involved in it should be yielded? What is this principle? It is nothing less than this: that throughout the whole course of executive action, summary, diversified, and multiform as it is, for wrongs done the citizen, all legal redress may be withdrawn from him; and he may be turned over as a petitioner to the power that did the wrong. If this may be done in the case under consideration, it may, on the same principle, be done in every similar case.

A seizure of a vessel and cargo may be made by an officer under a supposed breach of the revenue law, and the question of forfeiture may be referred to the Secretary of the Treasury. Private property may be taken for public purposes, and the owner may be limited to the remedy, if remedy it may be called, of petitioning some executive officer for remuneration. Military violence may be perpetrated on the person of a citizen or on his property, and his relief may be made to depend on the will of the commander-in-chief. In short, in every line of the executive power, wrongs may be done and legal redress may be denied.

The cases put may seem to be extreme ones, and therefore not likely to happen. But do they not test the principle? I think they do. If Congress may deprive these plaintiffs of their remedy by action at law, they may do the same thing in the cases specified. Indeed it would be difficult to prescribe any limit to legislative action on this subject. It can, at least, be extended through all the ramifications of executive power.

To say that this will never be done, and that the consequences spoken of can never happen, is no answer to the argument. Do the consequences lie within the exercise of the principle? If they do, the consequences must follow a general exercise of the power. The danger is in sanctioning the principle. At this point, I meet the principle and combat it. I object to it because it is dangerous and may be ruinous. It takes from the citizen his rights—rights secured to him by the Constitution; the trial by jury, in a court of *law. [*266

This is done by the act of 1839, if it be what it is now construed to be. In this aspect, then, I say, the act is unconstitutional and void. It not only strikes down the rights of the citizen, but it inflicts a blow on the judicial power of the country. It unites, in the same department, the executive and judicial power. And on a subject the most delicate and interesting; and one which, of all others, may most easily be converted into an engine of oppression.

In this government, balances and checks have been carefully adjusted, with a view to secure public and private rights; and any departure from this organization endangers all. We have less to apprehend from a bold and open usurpation by one department of the government, of powers which belong to another, than by a more gradual and insidious course. In my judgment, no principle can be more dangerous than the one mentioned in this case. It covers from legal responsibility executive officers. In the performance of their ministerial duties, however they may disregard and trample upon the rights of the citizen, he can claim no indemnity by an action at law. This doctrine has no standing in England. No ministerial officer in that country is sheltered from legal responsibility. Shall we in this country be less jealous of private rights and of the exercise of power? Is it not our boast that the law is paramount, and that all are subject to it, from the highest officer of the country to its humblest citizen? But can this be the case if any or every executive officer is clothed with the immunities of the sovereignty? If he cannot be sued, what may he not do with impunity? I am sure that my brethren are as sincere as I am, in their convictions of what the law is, in this case; and I have only to regret, that their views do not coincide with those I have stated.

ROBERT WHITE, PLAINTIFF IN ERROR, *v.* WILLIAM S. NICHOLLS, WILLIAM ROBINSON, OTHO M. LINTHICUM, EDWARD M. LINTHICUM, RAPHAEL SEMMES, PAUL STEVENS, AND CHARLES C. FULTON, DEFENDANTS IN ERROR.

ROBERT WHITE, PLAINTIFF IN ERROR, *v.* HENRY ADDISON, DEFENDANT IN ERROR.

In an action for a libel it is not indispensable to use the word "maliciously" in the declaration. It is sufficient if words of equivalent power or import are used.[1]

Every publication, either by writing, printing, or pictures, which charges upon, or imputes to, any person that which renders him liable to punishment, or which is calculated to make him infamous, or odious, or ridiculous, is *prima facie* a libel, and implies malice in the author and publisher towards the person concerning whom such publication is made.[2]

Proof of malice cannot, in these cases, be required of the party complaining, *beyond the proof of the publication itself; justification, excuse, or extenuation, if either can be shown, must proceed from the defendant.[3] [*267

[1] In *King* v. *Root*, 4 Wend. (N. Y.), 113, 136; s. c. 21 Am. Dec., 102, Chancellor Walworth said: "In ordinary cases of slander or libel, it is not necessary to allege in the declaration that the words were spoken, or the charge published, maliciously. It is sufficient to aver that it was falsely and injuriously done." *Bromage* v. *Prosser*, 9 Dowl. & Ry., 296, 303; s. c. 4 Barn. & C., 247; *Dillard* v. *Collins*, 25 Gratt. (Va.), 343; *Weaver* v. *Hendrick*, 30 Mo., 503; *Opdyke* v. *Weed*, 8 Abb. (N. Y.), Pr., 223; *Viele* v. *Gray*, 10 Id., 6; but wrongfully and injuriously are not the equivalent to maliciously. *De Medina* v. *Grove*, 10 Jur., 426. Its omission is cured by verdict. *McPherson* v. *Daniels*, 10 Barn. & C., 266; *Taylor* v. *Kneeland*, 1 Doug., 67. Willfully and maliciously have essentially the same meaning, if not precisely the same. *Lounds* v. *Delaware &c. R. R. Co.*, 3 Hun (N. Y.), 329.

[2] FOLLOWED. *Hetherington* v. *Sterry*, 28 Kan., 429. QUOTED. *Commonwealth* v. *McClure*, 11 Phil. (Pa.), 469. See *Smith* v. *Smith*, 26 Hun (N. Y.), 577.

By the term writing is also included printing. *Saunderson* v. *Jackson*, 2 Bos. & P., 238; *Henshaw* v. *Foster*, 9 Pick. (Mass.), 318; also marks with a lead pencil. *Geary* v. *Physic*, 5 Barn. & C., 238; *Clasen* v. *Bailey*, 14 Johns. (N. Y.), 484; and written on any substance. *Austin* v. *Culpepper*, Skin., 123; s. c. 2 Show., 314.

For definitions of libel, see *Hillhouse* v. *Dunning*, 6 Conn., 407; *Barr* v. *Moore*, 87 Pa. St., 390; *Parimeter* v. *Coupland*, 6 Mees. & W., 108; *Campbell* v. *Slottiswode*, 3 Best. & S., 782; *Layton* v. *Harris*, 3 Harr. (Del.), 407; *Steele* v. *Southwick*, 9 Johns. (N. Y.), 215; *Dexter* v. *Spear*, 4 Mason, 116; *Erber* v *Dun*, 12 Fed. Rep., 531; *Stone* v. *Cooper*, 2 Den. (N. Y.), 303; *Shipley* v. *Todhunter*, 1 Car. & P., 689. "The injurious detraction of any one by writing or equivalent symbols." *Williams* v. *Karnes*, 4 Humph. (Tenn.), 11. Thus setting up a lamp on the wall adjoining the plaintiff's dwelling-house and keeping it burning in the day, thereby inducing passers-by to believe that the plaintiff kept a brothel, was held to be a libel in effigy. *Jeffries* v. *Duncombe*, 2 Campb., 3; s. c. 11 East, 226. So scandalizing the plaintiff by carrying a fellow about with horns, bowing at the plaintiff's door, etc. Case of *Sir William Bolton* v. *Dean*, cited in *Austin* v. *Culpepper*, Skin., 123; s. c. 2 Show., 313. See *Spall* v. *Massey*, 2 Stark., 559; *Plunket* v. *Gilmore*, Fortes., 211; *Cropp* v. *Tilney*, 3 Salk., 226.

[3] It is undoubtedly the rule that where the publication is *prima facie* libellous no evidence of express malice

White v. Nicholls et al.

Privileged communications are an exception; and the rule of evidence, as to such cases, is so far changed as to require of the plaintiff to bring home to the defendant the existence of malice as the true motive of his conduct.[4]

Privileged communications are of four kinds:

1. Wherever the author and publisher of the alleged slander acted in the *bona fide* discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests.[5]

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can be required. *Fry* v. *Bennett*, 5 Sandf. (N. Y.) 54; *Sanderson* v. *Caldwell*, 45 N. Y., 398; *Wilson* v. *Noonan*, 35 Wis., 321; *Parks* v. *Blackiston*, 3 Harr. (Del.), 373; *Kinney* v. *Hosea*, Id., 397; *McKee* v. *Ingalls*, 4 Scam. (Ill.), 30; *Estes* v. *Antrobus*, 1 Mo., 197; *Weaver* v. *Hendrick*, 30 Id., 502; *Usher* v. *Severance*, 20 Me., 9; *Curtis* v. *Mussey*, 6 Gray (Mass.), 261; *Byrket* v. *Monohon*, 7 Blackf. (Ind.), 83; *Erwin* v. *Sumrow*, 1 Hawks (N. C.), 472. It cannot be inferred that there was a want of malice from the fact that the words were spoken but once. *Mason* v. *Mason*, 4 N. H., 110. But express malice may be proven to aggravate the damages. *Fry* v. *Bennett*, 28 N. Y., 330; *True* v. *Plumley*, 36 Me., 466; *Jellison* v. *Goodwin*, 43 Id., 287; *Spilling* v. *Carson*, 27 Md., 175; *Sawyer* v. *Hopkins*, 9 Shep. (Me.), 268; not however until some actionable words are first proven. *Abrams* v. *Smith*, 8 Blackf. (Ind.), 95.

[4] But where the defendant has established a *prima facie* case of privileged publication, then the plaintiff may show that he used his privilege to make a malicious attack upon the plaintiff; in which case his privilege cannot avail him. *Baboneau* v. *Farrell*, 15 Com. B., 360; s. c. 24 L. J., C. P., 9; 1 Jur., N. S., 14; *Garrett* v. *Dickerson*, 19 Md., 418; *Root* v. *King*, 4 Wend. (N. Y.), 113; *Suydam* v. *Moffat*, 1 Sandf. (N. Y.), 459; *Littlejohn* v. *Greeley*, 13 Abb. (N. Y.), Pr., 41; *Caulfield* v. *Whitworth*, 16 W. R., 936; *Swift* v. *Dickerman*, 31 Conn., 285; see *Holt* v. *Parsons*, 23 Tex., 9.

[5] The public or private duty imposed upon the person making the communication need not be a binding one at law; any "moral or social duty of imperfect obligation" is sufficient to protect him. *Harrison* v. *Bush*, 5 Ell. & B., 344; s. c., 25 L. J., Q. B., 25; *Shurtleff* v. *Stevens*, 51 Vt., 501; *Joannes* v. *Bennett*, 5 Allen (Mass.), 169; *Hamilton v. Eno*, 81 N. Y., 116; *Ormsby* v. *Douglass*, 37 Id., 477; *Van Wyck v. Aspinwall*, 17 Id., 190; *Hubbard* v. *Rutledge*, 57 Miss., 7. *Newspapers* cannot insist that they owe a duty to the public to publish defamatory charges against individuals, on the ground that the public have an interest in the matter published. *Foster* v. *Scripps*, 39 Mich., 376; s. c., 33 Am. Rep., 403; 41 Mich., 742; see *Curtiss* v. *Mussey*, 6 Gray (Mass.), 281.

When the defendant answers on inquiry and he is acting *bona fide* in the discharge of a moral or social duty, his answer is privileged. As was said by Grove, J., "Every one owes it as a duty to his fellow-men to state what he knows about a person when inquiry is made." *Robshaw* v. *Smith*, 38 L. J., 423. Such would be *bona fide* communication given concerning supposed criminals. *Kine* v. *Sewell*, 3 Mees. & W., 302; *Eames* v. *Whittaker*, 123 Mass., 342; see *Long* v. *Peters*, 47 Iowa, 239; *State* v. *Lonsdale*, 48 Wis., 348; *Sunderlin* v. *Bradstreet*, 46 N. Y., 188; *Taylor* v. *Church*, 8 Id., 452. Repeating the statement to the same party, or making statements akin to it, are also privileged. *Beaston* v. *Skene*, 5 Hulst. & N., 838; s. c., 6 Jur. N. S., 780; *Wallace* v. *Carroll*, 11 Ir. Com. L., 485; *Hopwood* v. *Thorn*, 8 Com. B., 283; s. c., 14 Jur., 87. And confidential communications may be made often not in answer to an inquiry, that will be privileged. *York* v. *Johnson*, 116 Mass., 482; *Mott* v. *Dawson*, 46 Iowa, 533; *Fowler* v. *Bowen*, 30 N. Y., 20; *Harper* v. *Harper*, 10 Bush. (Ky.), 47; *Stallings* v. *Newman*, 26 Ala., 300.

So communication made in the discharge of a duty arising from a confidential relationship existing between the parties are privileged. Thus an intimate friend may advise a young lady not to marry a certain suitor, giving his reasons however damaging, if he really believes in them. *Todd* v. *Hawkins*, 2 Moo. & R., 20; s. c., 8 Car. & P., 888; so an attorney who is conducting a case for a minor may inform his next friend of the minor's misconduct. *Wright* v. *Woodgate*, 1 Tyr. & G., 12; s. c., 2 Crompt. M. & R., 573. But unless the confidential

2. Any thing said or written by a master in giving the character of a servant who has been in his employment.[6]
3. Words used in the course of a legal or judicial proceeding, however hard they may bear upon the party of whom they are used.[7]
4. Publications duly made in the ordinary mode of Parliamentary proceedings, as a petition printed and delivered to the members of a committee appointed by the House of Commons to hear and examine grievances.[8]

relation exists, there is no privilege, even though the words are spoken confidentially. *Picton* v. *Jackman*, 4 Car. & P., 257; see also, *Atkins* v. *Johnson*, 43 Vt., 78.

Sending out a circular by the secretary of a society formed to protect its members against sharpers and swindlers, is not a privileged communication. *Beardsley* v. *Tappan*, 5 Blatchf., 497; *Sunderlin* v. *Bradstreet*, 46 N.Y., 188; *Getting* v. *Foss*, 3 Car. & P., 160; but it is if given upon inquiry to a person interested. *Ormsby* v. *Douglass*, 37 N. Y., 477.

[6] Cases of this kind are much more frequent in England than in this country. The following are several of the leading cases: *Weightman* v. *Gardner*, 13 Jur., 828; s. c., 13 Ad. & E. N. S., 796; *Gardner* v. *Slade*, 13 Q. B., 796; s. c., 18 L. J., Q. B., 334; 13 Jur., 826; *Child* v. *Affleck*, 9 Barn. & C., 403; s. c., 4 Mann. & R., 338; *Dixon* v. *Parsons*, 1 Fost. & F., 211; see *dicta* in *Fryer* v. *Kinnersley*, 15 Com. B. N. S., 429; s. c., 10 Jur. N. S., 441; 33 L. J., C. P., 96; *King* v. *Waring*, 5 Esp., 14.

Refusing to give a servant a letter of recommendation on his leaving cannot be considered as a slander. *Carroll* v. *Bird*, 3 Esp., 201. So one may warn his present servants against associating with a former servant whom he has discharged, even stating his reasons for dismissing him. *Somerville* v. *Hawkins*, 10 Com. B., 590; s. c., 20 L. J., C. P., 131; 15 Jur., 450. See *Monby* v. *Witt*, 18 Com. B., 544; s. c., 25 L., J., C. P., 294; 2 Jur. N. S., 1004. For American cases see *Fowler* v. *Bowen*, 30 N. Y., 20; *Dale* v. *Harris*, 109 Mass., 193.

[7] A party to an action may make any statements in the course of judicial proceedings he may reasonably deem necessary to his cause; and his privilege is not abridged by the fact that he may have maliciously stated them, if they can be reasonably deemed necessary to the case. *Lea* v. *White*, 4 Sneed (Tenn.), 111; *Perkins* v. *Mitchell*, 31 Barb. (N. Y.), 471; *Warner* v. *Paine*, 2 Sandf. (N. Y.), 195; *Gosslin* v. *Cannon*, 1 Harr. (Del.), 3; *Vausse* v. *Lee*, 1 Hill, (S. C.), 197; *Marshall* v. *Gunter*, 6 Rich. (S. C.), 419; *Allen* v. *Crofoot*, 2 Wend. (N.Y.), 515; *Dawling* v. *Wenman*, 2 Show, 446; s. c. 3 Mod., 108; *Cox* v. *Smith*, 1 Lev., 119; *Briggs* v. *Byrd*, 12 Ired., (N. C.), 377: *Forbes* v. *Johnson*, 2 A. K. Marsh., (Ky.), 480; *Hill* v. *Miles*, 9 N. H., 9.

[8] Where a petition containing defamatory matter was referred to a committee by Parliament, it was held that no action would lie for printing and circulating a few copies for the use of members. *Lake* v. *King*, 1 Mod., 58; s. c. 1 Saund., 131. So petitions honestly presented to Parliament are privileged. *Wason* v. *Walter*, L. R., 4 Q. B., 73; s. c. 38 L. J., Q. B., 34; 17 W. R., 169; 19 L. T., 409; 8 Best. & S., 730. It is a matter of public comment. *Dunne* v. *Anderson*, 3 Bing., 88; s. c. R. & M., 287; 10 Moo., 407. So is a report of the proceedings of a committee of either House. *Kane* v. *Mulvany*, Irish L. R., 2 C. L., 402. Nor is any member of a legislative body in any way responsible in a court of justice for anything said there. *Coffin* v. *Coffin*, 4 Mass., 1; *Commonwealth* v. *Blanding*, 3 Pick. (Mass.), 304, 314; *Hastings* v. *Lusk*, 22 Wend. (N. Y.), 410; but the words must be spoken officially. *Coffin* v. *Coffin*, *supra*. An indictment does not lie for an alleged conspiracy by the members to make speeches defamatory of the plaintiff. *Ex parte Wason* L. R., 4 Q. B., 573; s. c. 38 L. J., Q. B., 302; 40 L. J., M. C., 168; 17 W. R., 881. But the privilege does not extend to the private publication of speeches made in the House. *Rex* v. *Abingdon*, 1 Esp., 226; *Rex* v. *Creevy*, 1 Man. & Sel., 273; see *Davison* v. *Duncan*, 7 Ell. & B., 533; *Wason* v. *Walter*, L. R., 4 Q. B., 95; s. c. 8 Best. & S., 730; even though at common law, if ordered by Parliament. *Rex* v. *Williams*, 2 Show., 471; Comb., 18.

But in these cases the only effect of the change of the rule is to remove the usual presumption of malice. It then becomes incumbent on the party complaining to show malice, either by the construction of the spoken or written matter, or by facts and circumstances connected with that matter, or with the situation of the parties, adequate to authorize the conclusion.

Proof of express malice, so given, will render the publication, petition, or proceeding, libellous. Falsehood and the absence of probable cause will amount to proof of malice.

The jury being the tribunal to determine whether this malice did or did not mark the publication, the alleged libel should be submitted to them, and the court below erred in withholding it.

THESE two cases depended upon the same facts and principles, and were argued together. They were brought up by writ of error from the Circuit Court of the United States for the District of Columbia, sitting for the county of Washington.

The facts were these:

On the 26th of June, 1841, the following letter was addressed to the President of the United States:

"*Georgetown, June 26th*, 1841.

"SIR:—We feel it to be proper to put you in possession of the grounds upon which the removal of Mr. Robert White, from the office of collector of customs of this port, is requested. You will recollect the humiliating and prostrate condition of the people of this district about a year ago, when the majority then in Congress determined to destroy our banks as a punishment upon us for having avowed and published our preference for the candidates of the great whig party. It was in that dark season that Mr. White determined to desert his own fellow-citizens, and to join in the war which was making upon their liberties and interests. Being then seeking office, he thought to recommend himself to the executive by getting up a memorial here, which was to be used as a sanction or approval, on the part of our own citizens, of the mad policy which had been adopted by their oppressors. He then joined with an assemblage of forty-eight persons in getting up a memorial, which none but themselves could be induced to sign. These memorialists, with about five exceptions, could not be identified by name or residence, *as citizens of Georgetown. Upon investigation, they proved to be apprentices and journeymen, holding a transient residence in the town. Being few in number, they were no doubt believed by Congress, and persons at a distance, to be a select body of experienced merchants and traders, who had some knowledge of the subject of their memorial. A copy of the memorial has been deposited with the Secretary of the Treasury.

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"It is, perhaps, one of the vilest calumnies ever issued by a

band of thoughtless and irresponsible individuals, many of whom would have shrunk from such a proceeding had they the necessary intelligence to comprehend its enormity. But not so with Mr. White. He knew the paper contained an unmitigated slander. He seemed to be willing to blacken the character of those of his fellow-citizens who had been intrusted with the charge of our banks, if that would only secure an appointment when all other methods had failed him for the preceding twelve years.

"We revolt at the idea of Mr. White being permitted to remain in an office whose emoluments flow from the labor and enterprise of the very men whose business and families he sought to involve in ruin.

"It is impossible that he can ever regain the confidence of men whom he abandoned and vilified in the darkest hour of their existence. His expulsion from office is no less demanded by his unpardonable conduct, than by justice to the wounded feelings of an injured community.

"About the same time, June, 1840, with the persons under his influence, and as is believed at the request of an office-holder of great political rancor, Mr. White procured Dr. Duncan, then a member of Congress from Ohio, to deliver a speech here in abuse of General Harrison. The speech was, perhaps, the very vilest that was ever delivered by that gentleman.

"It was so satisfactory to Mr. White, who acted as vice-president on the occasion, that he immediately rose, and moved the doctor a vote of thanks, and a request that the speech be furnished for publication. The resolutions which were adopted unanimously on the occasion, were nearly as calumnious as the speech itself.

"We refer you to the Globe newspaper of the 3d July last, for an official account of the proceedings of the meeting. We will only trouble you with a few sentences, that you may have some idea of the character of those extraordinary proceedings. They denounced General Harrison as 'the nominee of the bank whig federalist, abolitionist and anti-masons,' 'an abolitionist of fraud and concealment,' as being guilty of pursuing a course 'grossly insulting to common sense, honesty, and decency, by shrouding himself in darkness,' 'of courting dangerous fanatics, and countenancing them (abolitionists) in their mad warfare upon our peace, our property, *and our lives,' [*269 and 'that he should be treated as an abolitionist.'

"Mr. White's was the place where the leading men of his party nightly assembled up to the close of the presidential election, and a respectable citizen declares, that since Mr. White's appointment he circulated 'bushels' of the 'Globe.'

He declines to give his formal evidence in the case, upon the ground, that he being a near neighbor of Mr. W., he is unwilling to disturb the friendly personal relations existing between them.

"Such was Mr. White's general political violence, and the unhesitancy with which he descended to the lowest means to secure the favor of the late administration, that no one doubted here but that he would be dismissed when the present party came into power, and no one can be more astonished than Mr. White is himself at his retention to the present time.

"We will also take this opportunity to state, that we desire Mr. H. Addison to be appointed to the office of collector in Mr. White's place, whose abundant testimonials and recommendations of our business citizens are already on file with the Secretary of the Treasury.

"With great respect, your obedient servants,

CHAS. C. FULTON,
E. M. LINTHICUM,
RAP. SEMMES,
O. M. LINTHICUM,
WM. ROBINSON,
WM. S. NICHOLLS,
PAUL STEVENS.

"P. S. It is further proper to state, that Mr. Addison's recommendations, filed with Mr. Ewing, are signed by every citizen in town, with a single exception, who have regular business to transact at the custom-house."

On some other day, which was not stated in the record, the following letter was addressed to the Secretary of the Treasury.

"HON. THOMAS EWING,
Secretary of the Treasury.

"SIR—Earnestly requesting, as we now do, the immediate removal of Mr. Robt. White from the office of collector of this port, we feel it proper to state candidly our insuperable objections to his continuance in that office.

"At a time when a remorseless and vindictive majority in Congress were making a ruinous war upon all the business interests of the country, by destroying confidence in its banking institutions, and when that majority were pursuing a most persecuting and ruinous course towards the defenceless and
*270] unoffending people of this District, Mr. White, for the mere purpose of evidencing his unscrupulous *zeal in behalf of the late administration, and to secure its favor, did, under the most offensive circumstances, sign a violently

abusive and insulting memorial to Congress, urging in the most decided manner the adoption of fatal measures toward the banks, by compelling them to continue specie payments, when all the institutions of Virginia and Maryland had suspended, and thereby to be compelled to pursue a destructive and burdensome policy towards their customers.

"The object of the memorial was to place something in the hands of our enemies, in the shape of an approval of their course, which was a gross deception.

"This offence becomes greatly aggravated, when it is known that Mr. White knew, so far as his acquaintance went with his co-signers, that they were too grossly ignorant of business and banking to be able to express any opinion upon such a subject. The other signers, with the exception of two or three, were so wholly unknown to our business community, that Mr. White would not be able to identify their persons or designate their residences. It is to be taken for granted that they were merely transient laborers, or persons so young as not then to have attracted the notice of our oldest and most observing citizens; some of them, indeed, were known to be small apprentices. So offensive and unpopular was the whole proceeding, that with the exception of, perhaps, two others, (from whom our community would look for nothing better,) Mr. White was the only respectable man of business who could be induced to put his name upon the paper. His own purpose could never have been detected, but for his appointment as collector, which so soon succeeded. Mr. White's experience in trade had taught him the indispensable necessity for banks in this District, and his intelligence and sense of justice were outraged by the declaration that our banks should be made to pay specie, when the banks of our neighboring states of Virginia and Maryland found it wholly impracticable so to do. He knew the gentlemen who had the management of our banks, directors as well as officers, and he knew they stood without reproach, and that it was wholly impossible that they could be influenced by the low and disreputable designs which his memorial so unscrupulously charged to them. It was a vile slander, put forth so as to evade the responsibility of a legal prosecution. We think he is the last man to hold an office, the value of which depends upon the enterprise and integrity of the very men whose families and business were alike to be overwhelmed with ruin at his special application.

"His removal from an office thus obtained would be doubly gratifying to us, when we know his family does not need its emoluments for support.

"It can be proved that at his store, in which the office of

collector is kept, there were almost nightly assemblages of the principal party men who sustained the late administration, and particularly during the fall of 1840.

*271] *"A highly respectable man has stated that, during the latter part of the late canvass, he saw Mr. White preparing immense numbers of the newspaper called the 'Washington Globe,' for circulation, but, being a neighbor of Mr. White, he is unwilling to appear as a witness against him. The language the gentleman used was, that 'he had seen bushels of the Globe so prepared, since his appointment as collector.'

"Under these circumstances, we would most respectfully ask you to dismiss Mr. White from the office, and that our fellow-townsman, Mr. Henry Addison, who has already been recommended by most of us, may be appointed to fill it.

O. M. LINTHICUM,	WM. HAYMAN,
RAPHAEL SEMMES,	JOS. SMOOT,
WM. ROBINSON,	WM. S. NICHOLS,
E. M. LINTHICUM,	JAMES THOMAS,
PEREGRINE WARFIELD,	JEREMIAH ORME,
ROBERT OULD,	T. P. WAUGH,
WM. JEWELL,	EDW. S. WRIGHT,
WILLIAM LAIRD,	J. RILEY,
WM. LANG,	W. S. RINGGOLD,
S. E. SCOTT,	J. I. STULL."

On the 19th of June, 1841, the following letter was addressed to the Secretary of the Treasury.

"*Georgetown, June* 19, 1841.

"SIR:—About a year ago, the Hon. A. Duncan, of Ohio, was invited, by a number of office-holders and others, to hold a political meeting in this town.

"The meeting was held on the 26th June, 1840, and the proceedings were published in the Globe, on or about the 3d July.

"Mr. Robert White, our collector of customs, acted as one of the vice-presidents of the meeting, and who was so tickled and delighted with Duncan's vile calumnies upon Gen. Harrison, that he arose and made the motion that he (Duncan) would prepare the speech for publication. The address was said to be one of the vilest, and, if you desire it, a copy shall be presented for your perusal. The persons who moved the resolutions, and one of the secretaries, were clerks in the departments.

"We now hand you a copy of two of the resolutions, and an account of the proceedings, which we present separate, for

your immediate and convenient notice, referring you at the same time to the very lengthy account to be found in the Globe of the date mentioned above.

"You will see that the copy now sent applies the following language to General Harrison: 'Nominee of the bank whigs, federalists, abolitionists, and anti-masons.' 'Fraud and concealment'—'grossly insulting common sense, decency, and honesty, by shrouding himself in darkness'—'of courting dangerous fanatics, and *countenancing them in [*272 their mad warfare upon our peace, property, and lives.' 'He should be treated as an abolitionist.'

"This conduct of Mr. White, in connection with his signature being placed to the infamous anti-bank memorial, which a delegation from town left in your hands when Mr. White's removal was first requested, renders him extremely offensive to the whigs here. We again would take the opportunity to remind you of our earnest hope that Mr. H. Addison will be appointed to that office, whose full and abundant testimonials are already in your possession.

"The continuance of Mr. White is mortifying to every real friend of the administration here.

"With respect, your obedient servants,

O. M. LINTHICUM,
WILLIAM LAIRD,
WM. S. NICHOLLS.

"Hon. T. EWING,
Secretary of the Treasury.'

On the 21st of September, 1841, the following letter was addressed to the President.

"*Georgetown, Sept.* 21, 1841.

"SIR:—Should any paper be sent to you, contradicting in any manner a representation made by ourselves to the conduct of Mr. White, late collector of this port, we will thank you to let us have a copy of that paper, with the names appended thereto, that we may see in what particular, and to what extent, our statement may have been contradicted, and by whom.

"With great regard, we are, sir, your obedient servants,

O. M. LINTHICUM,
W. ROBINSON,
WILLIAM LAIRD,
RAPH. SEMMES,
WM. S. NICHOLLS,
D. ENGLISH, Jun.

"To His Excellency, JOHN TYLER, President U. S."

And upon the 23d of September, 1841, the following:

"*Georgetown, September* 23, 1841.

"SIR:—I feel bound to make to you this statement, in consequence of a report which has reached my ears, that Mr. Robert White, with Captain Carbery, and B. Mackall, are endeavoring, by their joint influence and representations, to injure me in your estimation. It is due no less to you, than to my friends and myself, to write you this letter, in which I shall omit every thing that is not really necessary to be stated.

"As to Mr. White, I feel warranted in assuring you that the representations made to you by my friends in regard to him, *273] are true throughout, of which fact they will be able to furnish you the *abundant evidence. No man of character here would hazard the intimation that these friends of mine would possibly descend to a misrepresentation in regard to Mr. White or any one else.

"For all they have stated they can produce a mass of evidence too strong to be doubted.

"In relation to Mr. Carbery, I have only to refer you to my letter to you of the 23d August, and its accompanying papers. I would take much pleasure in furnishing you with any further explanations in regard to that case that you might desire.

"It is wholly impossible that Mr. Mackall can have the least ground for complaint, as I can supply you with abundant proof that there was no employment here for him whatever, nor any prospect of need of his services at any time hereafter. All the labor performed by him, since I have been appointed to this office, was merely to sign a receipt for his pay. He, or his friends for him, appealed to the Secretary of the Treasury, and seemed to have succeeded in producing an impression on his mind that I was meditating an unjust proceeding towards Mr. Mackall—all this, too, before I had said or written a word to Mr. Ewing upon the subject. He wrote me that Mr. Mackall must not be removed until I assigned him my reason for so doing. I obeyed his order; but, on the very day I wrote him that there was no service for Mr. Mackall to perform, Mr. Ewing instructed me to discontinue the office. Mr. Mackall still complained to the Secretary, who wrote me to come to the Treasury Department. I went, and after hearing my statement, he said he was then satisfied that he had done what was proper in the case. I did not feel at all hurt at the course taken by Mr. Ewing, because I knew that the whole matter had been grossly misrepresented to him. I had been waited

upon by a friend, who earnestly remonstrated with me upon the subject of abolishing Mr. Mackall's office; as he said that, in that case, the influence of a powerful family connection would be immediately wielded against me. I did not exactly see the propriety of being governed by such apprehensions, and took the course prompted by my sense of duty, and relying confidently upon the favorable result of an impartial investigation, should any difficulty occur.

"There is but little revenue collected at this port, and I felt it to be my duty to conduct its business with as little expense as possible. I found the expense of this office, as far as Georgetown is concerned, to be - - - $2,573 34

"I have reduced these expenses to the sum of $1,045 00

"Thus saving to the government, - - $1,428 34

without at all impairing the efficiency of the service. The whole expense of the office for Georgetown is now absolutely $45 a year less than Mr. Mackall was receiving for doing nothing. The expenses in Washington I have reduced twenty-five per cent. I did *this from a sense of [*274 duty, but not without anticipating much misrepresentation and abuse.

"I am, sir, with great regard, your obedient servant,

"H. ADDISON.

"To the PRESIDENT."

On the 18th of November, 1841, Robert White brought the two suits mentioned in the titling of this statement.

The declaration in the suit against Nicholls and others contained two counts.

The first was as follows: "And whereupon the said plaintiff, by Brent & Brent and Francis S. Key, his attorneys, complains, for that whereas previous to, and at the time of committing of the several grievances by the defendants as hereinafter mentioned, the plaintiff was collector of the customs for the district, and inspector of the revenue for the port of Georgetown in the District of Columbia; yet the defendants well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and contriving, and wickedly and maliciously intending to injure the plaintiff in his good name, fame, and credit, and to bring him into public scandal, infamy, and disgrace, with and amongst all his neighbors, and other good and worthy citizens of the county aforesaid, and to cause the plaintiff to be removed from his said office, heretofore, to wit: on the 20th June, 1841, at Georgetown, to wit, at the county aforesaid, falsely, wickedly, and maliciously did

compose and publish, and caused to be composed and published, of and concerning the plaintiff, and of and concerning his aforesaid office, and of and concerning the plaintiff's conduct in his said office, for the purpose of procuring his removal from said office, a certain false, malicious, and defamatory libel, containing, amongst other things, the false, scandalous, malicious, defamatory, and libellous matter of and concerning the plaintiff, and of and concerning his aforesaid office, and of and concerning his said plaintiff's conduct in his said office, for the purpose of procuring the removal of the plaintiff from his said office, as follows, that is to say:" (then followed a copy of the letter to the President of June 26, 1841, down to the words "delivered by that gentleman," with the necessary innuendoes.)

The second count was as follows: "And whereas also the said defendants, intending and contriving to cause the plaintiff to be removed from the office then held by him, as stated in the first count heretofore, to wit, on the 26th June, 1841, at Georgetown, to wit, at the county aforesaid, falsely, wickedly, and maliciously, did compose and publish, and cause to be composed and published, of and concerning the plaintiff, and of and concerning his office, and of and concerning his conduct in his said office, and for the purpose of procuring his removal from his said office, a certain other false, malicious, and defamatory libel, containing, amongst other things, the
*275] following false, scandalous, malicious, defamatory, and libellous *matter of and concerning the plaintiff, and of and concerning his said office, and of and concerning his, said plaintiff's, conduct in his said office, and for the purpose of procuring the plaintiff's removal from his said office, that is to say:

"Mr. White's was the place, &c.," (then followed the remainder of the letter not included in the first count.)

The declaration concluded as follows:

"By reason of publishing of which said several libels, the said plaintiff saith, that he hath been and is greatly injured in his good name, fame, and credit, with and amongst all his neighbors, friends, and acquaintance. And by reason of the publishing of which said several libels, the plaintiff saith that he was heretofore, to wit, on the 12th day of July, 1841, at the county aforesaid, removed from his office aforesaid, and was thereby deprived of the emoluments and income of said office, amounting to a large sum of money, to wit, the sum of three thousand dollars annually, and hath been otherwise greatly injured, whereby the said plaintiff saith that he hath

damage, and is the worse, to the value of twenty-five thousand dollars; and therefore he brings suit, and so forth.

"BRENT & BRENT, *for plaintiff*."

The declaration in the suit against Addison also contained two counts, with no essential variation from the above.

The defendants pleaded not guilty, and in November, 1842, the causes came on for trial. They were tried together, the same evidence and instructions prayed from the court being common to both. The jury, under the direction of the court, found a verdict of "not guilty," and the following bills of exceptions show the points of law which were raised and ruled.

Plaintiff's 1st Bill of Exceptions.

"In the trial of these causes, the plaintiff, to support the issues on his part, offered evidence to show that he was duly appointed to the office set forth and described in the declaration, on the 21st day of July, 1840; and that he was acting as such officer from that time till the 9th day of July, 1841, when he was removed from office, and the defendant, Henry Addison, appointed in his place; and then further offered in evidence a written paper, (viz., the letter to the President,) and proved that the same was in the handwriting of the defendant Addison, and that the signatures thereto were in the handwriting, respectively, of the several defendants; that the said paper so written and subscribed was sent to the President of the United States, and by him sent to the Treasury Department, where it was filed on or before the 30th June, 1841, and kept by a clerk of that Department having charge of such papers, and shown on one occasion to one person by him—which person had called to see it at the request of the plaintiff; and also on another occasion to another person.

[*276 *"And the plaintiff further offered evidence that one of the said defendants, whom he named, said, about the time of signing the said paper, and before the plaintiff was turned out of office, that the plaintiff had signed a memorial against the banks in the District, and swore that he would have him turned out of office.

"And also offered evidence that another of said defendants, also named, had on one occasion said, after the said paper had been sent to the President, that he had made no charges against the plaintiff; and on another occasion he stated he had made charges, and that he could prove against the plaintiff more than he had so charged.

"And the plaintiff further proved that the said paper, so

written and subscribed, was shown to a citizen of Georgetown for the purpose of being subscribed by him, who refused so to do, because he was not acquainted with all the facts stated in said paper.

"And the plaintiff, upon the evidence aforesaid, offered thereupon to read the said paper to the jury; but the court refused to allow the said paper to be read in evidence to the jury.

"To which refusal of the court the plaintiff excepts, and prays the court to sign and seal this bill of exceptions, which is done accordingly, this 3d day of January, 1843.

"B. THRUSTON, [SEAL.]
"JAS. S. MORSELL." [SEAL.]

Plaintiff's 2d Bill of Exceptions.

"And the plaintiff further offered, after the evidence aforesaid in former exceptions had been given, to show the malice of defendants in writing, signing, and presenting said paper, to read the said paper, and offered evidence in connection therewith of the falsehood of the charge therein stated, which the court also refused, and the plaintiff excepts to said refusal, and prays the court to sign and seal this bill of exceptions, which is done accordingly, this 3d January, 1843.

"B. THRUSTON, [SEAL.]
"JAS. S. MORSELL." [SEAL.]

Plaintiff's 3d Bill of Exceptions.

"And the plaintiff, after the evidence was offered, as stated in the first and second bills of exceptions, and after the opinion had been given by the court, as therein stated, then offered to prove by substantial evidence, for the purpose of showing malice in the defendants in writing, signing, and presenting the said paper, that the charge contained in the said paper, of the plaintiff's having lost the confidence of the men from whose labors and enterprise the emoluments of his office flowed, was false, malicious, and without probable cause; that all the persons doing business with the said plaintiff, as such officer in his said office, during all the time of his continuing in office, were General Walter Smith, Henry McPherson, John Hopkins, and Jabez Travers,—all which persons the *277] plaintiff *now offers as witnesses to prove that the plaintiff had never lost their confidence, but that they always continued their confidence in the plaintiff, and approved of his conduct as such officer. And also, further to falsify the said charge, the plaintiff offers to prove that an election was held in Georgetown, in February, 1841 and 1842, for a common councilman in said town, in which election a majority of the

qualified voters of said town voted for the plaintiff; and he was elected to the common council, notwithstanding the active opposition of several of the defendants.

"And the plaintiff, also, further offered to prove that the charges in the said paper of the plaintiff's having descended to the lowest means to secure the favor of the late administration, and that he procured Doctor Duncan to deliver a speech in Georgetown in the abuse of General Harrison; and that the plaintiff's was the place where the leading members of his party nightly assembled up to the close of the presidential election; and that the plaintiff, since his appointment to his said office, had distributed bushels of the Globe, were false, malicious, and without probable cause, by producing witnesses to falsify and disprove the said charges, and show that there was no foundation or probable cause for said charges.

"But the court was of opinion that such evidence was inadmissible, and refused to allow the same to be given in evidence to the jury; to which refusal the plaintiff by his counsel excepts, and prays the court to sign and seal this bill of exceptions, which is done accordingly, this 3d of January, 1843.

"W. CRANCH, [SEAL.]
"JAS. S. MORSELL." [SEAL.]

Plaintiff's 4th Bill of Exceptions.

"In the further trial of this cause, and after offering the evidence stated in the preceding bills of exceptions, and after the opinions and decisions of the court as therein stated, the plaintiff, by his counsel, in order to show express malice, and the want of all probable cause in the defendants, in writing, and subscribing, and presenting, as before stated, the paper—writing set out in the declaration—and that the same was so written, subscribed, and presented by such defendants, not for the purpose of claiming redress for a grievance in the conduct of a public officer, but maliciously, and from private pique and resentment, and in order that the said paper, with the evidence now to be offered, should go to the jury as evidence of malice on the part of the defendants by compe tent evidence, and the want of probable cause for the charges contained in said paper, and in connection with such evidence to offer the said paper in evidence to the jury.

"And the defendants, by their counsel, objected to said evidence; and thereupon, the court refused to allow the same to be given for the purpose above stated, or for any other purpose; to which the plaintiff, *by his counsel, [*278 excepts, and prays the court to sign and seal this bill of

exceptions, which is done accordingly, this 5th day of January, 1843.

"Witness our hands and seals, this 5th day of January, 1843.

"B. THRUSTON, [SEAL.]
"JAS. S. MORSELL." [SEAL.]

Plaintiff's 5th Bill of Exceptions.

"In the further trial of this cause, and after the evidence stated in the preceding bills of exceptions had been offered as stated, and after the opinions and rejections of evidence as herein stated, the plaintiff in support of the issues joined on his part, for the purpose of proving a publication of the libel charged in the declaration on the part of certain of defendants, whose names are signed to the papers, now offered in evidence the following papers, (the several handwritings of the said defendants signing the same being admitted:)

"The letter to the Secretary of the Treasury;

"The letter of June 19th, 1841;

"The letter of September 21st, 1841;

by showing, from the said papers, that the said defendants had referred to and re-asserted the truth of the charges contained in the said libel charged in the declaration; and that such reference and re-assertion was not privileged, and was a publication of the libel, for which said defendants were responsible in this action.

"And in the case against Henry Addison, the plaintiff, for a like purpose, and to prove in the same way such a publication of the libel charged in the declaration as he was responsible for in this action, offered in evidence a paper, admitted to be in the handwriting of said defendant, Henry Addison, viz.: the letter of September 23d, 1841.

"And the defendants, by their counsel, objected to the admissibility of said papers so offered in evidence.

"And the court sustained the said objection, and refused to allow the said paper to be given in evidence: to which opinion and refusal the plaintiff, by his counsel, excepts, and prays the court to sign and seal this bill of exceptions; which is done accordingly, this 5th day of January, 1843, as witness our hands and seals.

"W. CRANCH. [SEAL.]
"JAS. S. MORSELL." [SEAL.]

To review the decision of the court on these several points of law the present writ of error was brought.

May and *R. Brent*, for the plaintiff in error.
Bradley and *Coxe*, for the defendants in error.

May, for plaintiff in error.

What is the law applicable to the facts exhibited in this record?

*It will hardly be denied that, in ordinary cases, the writing here declared on would, in view of its terms [*279 and tendency, be considered a libel, and the defendants to have acted maliciously, that is, with the view to effect those consequences, to which the means they have used naturally and obviously lead. 2 Starkie's Ev., 361.

But it will be contended that this is distinguished from the ordinary cases of libel, by reason of the occasion of writing and publishing it; it purporting to be a complaint about an official grievance, and being addressed to the President of the United States, the proper authority to redress it; that this is what is termed "a privileged communication."

That there is such a description of libels, well classified by stable legal distinctions, is admitted. They are founded upon considerations of public policy and convenience, and do confer upon their authors and publishers certain privileges.

Now what is the nature of a privileged communication, and what are its legal incidents?

It may be defined to be a writing published *bona fide* about a lawful occasion.

This lawful occasion may be found in the performance of a public or private duty of a legal or moral nature—of the fair and honest fulfilment of such obligations as spring out of the social relations of life; as in the exhibition of articles of the peace before a civil magistrate, or other communication in the way of a judicial proceeding; a petition about a public nuisance, or remonstrance presented by citizens to the proper authorities; an account of the character of a servant, made by a master; a report on the character of an intended husband, given by a brother to a sister, &c.

But these privileged libels are separated into two classes.

The first are all such communications as are presented in the course of justice, and before a tribunal having power to examine into their truth or falsehood.

The second class are all such as do not arise in the course of justice, and before a tribunal, &c.

Now, it is said to be the incident of the first class, that the occasion is an absolute bar to an action, even though the libel be false and malicious.

The incidents of the second class are, that the law only raises a *prima facie* presumption in favor of the occasion, which operates in the nature of evidence, and supplies a *prima facie* justification; and also that, under the general issue plea,

the motives of the defendant, and the truth of the libel, may be given in evidence to the jury.

But there must be the concurrence of an upright intention along with the lawful occasion. It must not be an officious intermeddling with the rights of others, nor published through hatred and ill-will. It is the first requisite of this class of "privileged communications," that there be no taint of per-
*280] sonal malice about it.

*A writing thus justified by the occasion and good motives of its authors, bestows upon them an irresponsibility to legal condemnation, even though it produce injury to the rights of others.

This doctrine is founded not only upon considerations of public convenience, but also on a confidence in human motives, where they are upright and pure.

The law preferring to suffer the contingencies of occasional injury that may happen to individuals, rather than by shutting the door to the freedom of inquiry and complaint upon the administration of public affairs, the proceedings of courts of justice, or the performance of moral duties, where done fairly and truthfully, and the well-being of society should be preju diced. Besides, the party accused in such cases is not without redress. If he be assailed unjustifiably in a judicial proceed ing in a court, its dignity is offended and its censures secured, besides, the benefit of evidence to vindicate himself and dis-prove such charges is afforded. The true criterion of the privilege in the first class, (which creates a bar to an action,) is to be found in the power of the tribunal to afford this redress. If the libel be published before those who cannot afford this summary redress, then the occasion does not bar an action, and the libel belongs to the second class of privileged communications; and in all these, if the libel be malicious in fact, the privilege is gone, and the pretext of the occasion only serves to aggravate the wrong.

But the law in favor of these occasions will not (as in ordi-nary libels) imply malice, but it must be proved. And this is the great distinction.

There are two kinds of malice, as Justice Bayley distin-guishes in 4 Barn. & Cress., 255; malice in law, and malice in fact. The first is inferred, the last must be proved. The first is a legal inference from all ordinary libels. The last is a legal requisite to maintain an action upon a privileged libel; and when malice in fact can be proved, the privilege that sur-rounded the libel, and in legal contemplation purified it, is stripped off, and the exposed libeller stands on the same level with the rest of his kind,

Lord Mansfield said, in Bull. N. P., 8, "Malice is the gist of the action, which is not implied from the occasion, but must be directly proved."

And to sustain this summary of the general doctrine, are the following authorities:

English. 4 Rep., 14; 2 Smith, 8; 1 Barn. & Ald., 289; 5 Id., 648; 8 Barn & C., 578; 1 Moo. & R., 198; 2 Bing. N. C., 464; 1 Saund., 131; 2 Burr., 808.

American cases and authorities. 2 Kent Com., 22. In Massachusetts, 3 Pick. (Mass.), 383; 4 Mass., 168; 9 Id., 264. New York, 5 Johns. (N. Y.), 34; 4 Wend. (N. Y.), 135. Pennsylvania, 2 Serg. & R. (Pa.), 22; 4 Id., 423. Maryland, 5 Harr. & J. (Md.), 459.

*Now the case at bar must belong to the second class of privileged communications, if indeed it be privileged at all. The President could not afford any redress to the plaintiff. He has no power to compel the attendance of witnesses, or to administer an oath. He could not inquire in a judicial way into the truth or falsehood of the charges. The plaintiff then turned to the Circuit Court for redress, and brought his action on the case. But that court refused, as the exceptions show, to allow him to read the libel to the jury, and to prove it "false and without probable cause," and that the defendants were actuated by malice in fact, or "express malice." But falsehood and want of probable cause are in themselves evidence of malice in fact. 1 Moo. & R., 470; 4 Bing., 408; 4 Serg. & R. (Pa.), 423; 5 Harr. & J. (Md.), 458. [*281

But the privilege of this libel is very questionable. It prefers charges not relating in any wise to the plaintiff's official character. It alleges political offences committed before his appointment to office. It shows a personal aspiration after the office held by plaintiff. It is couched in terms of great asperity, and breathes throughout a spirit wholly incompatible with the honest purpose of redressing a public grievance. The privilege is doubtful upon the face of the libel, and whether privileged or not was a question for the jury. 9 Barn. & Cress., 406; 2 Bing., 408.

The fifth exception shows a reiteration of the libel by the defendant Addison, after the plaintiff was removed from office. Then there was no privilege, and such repetition is a republication. 3 Stephens' N. P., 2564, and cases there cited.

I have now explored this record. Questions of the gravest consequences are presented by it. They may well claim to be decided by this the highest court in our land. The doctrine of "privileged communications" is here to be settled. There is seeming contrariety of judicial opinion on the subject in

our country. The cases in 1 Saund., in 5 Johnson, and in 2 Tyler (Vt.), were approved by the court below as establishing the irresponsibility of these defendants, and will be relied on here to sustain that position.

Under the free dispensations of our Constitution and laws, where the greatest liberty of speech and of publication is allowed, and where this liberty, under the heat of political passions, is ever tending towards licentiousness, in assaults upon political adversaries who may be enjoying in office the fruits of party success, the questions here presented become most interesting, and the decision that your honors may pass upon them will ascertain the value of that great right, to this description of citizens, "of being secure in their good reputation."

Bradley, for defendants.

If this action should be maintained, there will be no end to *282] actions for libels. The defendants were dissatisfied with a public officer, *and complained of what they thought a grievance to the officer who could redress it. If this course was not absolutely privileged, yet it was so much so as to compel the plaintiff to show that the acts were done without probable cause and with malice, and to charge it so in his declaration. Bull. N. P., as cited, says that malice and falsehood are the gist of the action, but publication is also necessary. The case in 7 T. R., 110, 111, shows that the occasion there justified the publication; and this is always a question for the court. In 1 Barn. & Ald., 339, the jury determined whether or not the words were used, but the question of occasion was reserved for the court. In 12 Wend., (N. Y.), 410, 546, all the American authorities are summed up. The great difficulty is to know how far the question of privilege goes. In this case the court below thought that the letters were addressed to such officers as were competent to remedy the grievance. In 1 T. R., 130, the defendant pleaded precisely what has been shown in this case. In 2 Tyler's (Vt.), 129, 133, it was held that where the occasion made a petition to the legislature necessary, no action would lie. If in this case the defendants had published the letter to the President, no privilege could have been pleaded. Kent Com., 22.

In 2 Serg. & R. (Pa.), 23, the libel was read to the jury without objection; but here we object that the plaintiff himself shows it to be a case of privilege.

In 4 Id., 424, it was ruled that where malice and want of probable cause were relied upon to take away the ground of privilege, they must be averred in the declaration. So also 1

Wils., 242; 2 Id., 304. All the exceptions in this case depend upon the first, for if the libel cannot be read the other papers cannot.

Coxe on the same side.

What are the points in the case? (Mr. *Coxe* here examined the several counts in the declaration.) The result of the whole is, that a person belonging to one party charges some of the other party with being guilty of a crime to effect his removal from office. The communication charged as libellous, was addressed to the President, and is not averred to have been ever published. That officer was vested with the whole control of the subject. The paper was sent to the Secretary of the Treasury, from whom an agent of the plaintiff obtained it. There was no proof of publication whatever. Some of the exceptions relate to mere matters of aggravation, which were not admissible in evidence unless a ground of action was laid. Publication is essential; and it must be proved before the libel can be given in evidence. Stark. Ev., 351. The defendants are charged, it is true, with having shown the paper to citizens of Georgetown; but they had a right to show it for the purpose of obtaining signatures. 1 Wend. (N. Y.), 547.

*Was it a publication to send it to the President? It [*283 was not sent for the purpose of injuring the plaintiff's character, but solely for the purpose of obtaining his removal from office. It was a perfectly constitutional proceeding; if not, Congress should pass an act to burn all the letters in the Departments. The President had full and exclusive jurisdiction over the subject, and was the sole judge of the propriety of the removal of the plaintiff. His reasons cannot be inquired into by the judiciary. 13 Pet., 255.

It is a well established principle, that when an action is brought for an act which is in itself lawful, those matters, beyond the act, which make it criminal, must be averred in the declaration. For example, in an action for keeping a mischievous dog: it must be averred that the dog was addicted to biting, and that the defendant knew it to be so. In this case the defendants had a right to address the President, and it must be averred that there was express malice, and also a want of probable cause. If the paper had been printed and handed about, it would have given a different aspect to the affair. In *Stockdale's case*, he was not responsible as long as the paper was confined to parliament. Generally, sending it to a third party is a publication, but not in all cases; such as sending information about a servant, &c.

It is said that the President could not have taken testimony about the matter. Suppose it to be so, and that his functions are imperfect, still his jurisdiction over the subject-matter and power to act according to his judgment cannot be denied.

Evidence of malice cannot be given under this declaration. There should have been a special action on the case.

R. J. Brent, for plaintiff, in conclusion.

This declaration is in the usual form, if the paper is an ordinary libel; but not, if the paper is one which the party was privileged to send. On the face of the paper it is clear, that the removal of the plaintiff was not asked for upon public grounds, because the acts complained of took place before his appointment to office. He is not charged with unfitness for office, but held up to odium as a private individual. There was a personal motive in all this. Addison was to be appointed in his place. The motive is an important consideration. 2 Bing. N. C., 463.

The paper is actionable on its face, as it charges the plaintiff with things which are calculated to bring public odium upon him: such as "descending to the lowest means," &c.

The declaration avers special damage. 1 Chitt. Pl., 291, ed. 1829; 3 Johns. (N. Y.) Cas., 198.

It has been said that the declaration is insufficient, because it does not aver express malice. But it charges, that the acts *284] were done "falsely and maliciously." Is not this enough? It does not *aver, that the libel was published "in presence of divers citizens," but it says, that it was "published," which is the usual form.

In 2 Bing. N. C., 273, the declaration was the same as in the present case.

In all the cases cited, the libel was read to the jury, but in the court below it was shut out.

As to the question of pleading, see 4 Wend. (N. Y.), 136; 2 Burr., 812; 4 Bos. & Pul., 48. In the last case the action was for defaming a candidate for Parliament. The averment in the declaration was the same as in this case, and the plaintiff recovered.

As to what is a sufficient averment, see Holt on Libels, 256; 2 Smith, 43.

Mr. Justice DANIEL delivered the opinion of the court.

In the investigation of these cases it is deemed unnecessary to examine *seriatim* the five bills of exceptions sealed by the Circuit Court, and made parts of the record in each of them. The papers declared upon as libellous, and the instructions

asked of the Circuit Court, are literally the same in both actions; the reasons, too, which influence the decision of the court pervade the whole of these instructions, and are presented upon their face.

Before proceeding more particularly to consider the rulings of the court upon these instructions, it may be proper to animadvert upon a point of pleading which was incidentally raised in the argument for the defendants in error; which point was this: that, assuming the publication declared on as a libel to be one which would be *prima facie* privileged, the circumstances which would render it illegal, in other words, the malice which prompted it, must be expressly averred. Upon this point the court will observe, in the first place, that in cases like the one supposed in argument, they hold, that in describing the act complained of the word "maliciously" is not indispensable to characterize it; they think that the law is satisfied with words of equivalent power and import: thus, for instance, the word "falsely" has been held to be sufficiently expressive of a malicious intent, as will be seen in the authorities cited 2 Saund., 242 a, (note 2.) But the declaration in each of these cases charges the defendants, in terms, with maliciously and wickedly intending to injure the plaintiff in his character, and thereby to effect his removal from office, and the appointment of one of the defendants in his stead; and with that view, with having falsely, wickedly, and maliciously composed and published, and having caused to be composed and published, a false, malicious, and defamatory libel concerning the plaintiff, both as a citizen and an officer. The averments in these declarations appear to the court, in point of fact, to be full up to the requirement insisted on, and to leave no room for the criticism attempted with respect to them. But the defence set up for the defendants in error reaches much further and to results infinitely higher *than [*285
any thing dependent upon a mere criticism upon forms of pleading. It involves this issue, so important to society, viz.: How far, under an alleged right to examine into the fitness and qualifications of men who are either in office or are applicants for office—or, how far, under the obligation of a supposed duty to arraign such men either at the bar of their immediate superiors or that of public opinion, their reputation, their acts, their motives or feelings may be assailed with impunity—how far that law, designed for the protection of all, has placed a certain class of citizens without the pale of its protection? The necessity for an exclusion like this, it will be admitted by all, must indeed be very strong to justify it: it will never be recognized for trivial reasons much less upon

those that may be simulated or unworthy. If we look to the position of men in common life, we see the law drawing providently around them every security for their safety and their peace. It not only forbids the imputation to an individual of acts which are criminal and would subject him to penal infliction; but, regarding man as a sympathetic and social creature, it will sometimes take cognisance of injuries affecting him exclusively in that character. It will accordingly give a claim to redress to him who shall be charged with what is calculated to exclude him from social intercourse; as, for instance, with being the subject of an infectious, loathsome, and incurable disease. The principle of the law always implying injury, wherever the object or effect is the exposure of the accused to criminal punishment or to degradation in society. These guardian provisions of the law, designed, as we have said, for the security and peace of persons in the ordinary walks of private life, appear in some respects to be extended still farther in relation to persons invested with official trusts. Thus it is said that words not otherwise actionable, may form the basis of an action when spoken of a party in respect of his office, profession, or business: *Ayston* v. *Blagrave*, Str., 617, and 2 Ld. Raym., 1369. Again, in *Lumby* v. *Allday*, 1 Crompt. & J., 301, where words are spoken of a person in an office of profit, which have a natural tendency to occasion the loss of such office, or which impute misconduct in it, they are actionable. And this principle embraces all temporal offices of profit or trust, without limitation: 1 Stark. Slander, 124.

With regard to that species of defamation which is effected by writing or printing, or by pictures and signs, and which is technically denominated *libel*, although in general the rules applicable to it are the same which apply to verbal slander, yet in other respects it is treated with a sterner rigor than the latter; because it must have been effected with coolness and deliberation, and must be more permanent and extensive in its operation than words, which are frequently the offspring of sudden gusts of passion, and soon may be buried in oblivion: *Rex* v. *Beau*, 1 Ld. Raym., 414. It follows, therefore, that
*286] actions may be maintained for defamatory words published *in writing or in print, which would not have been actionable if spoken. Thus, to publish of a man in writing, that he had the itch and smelt of brimstone, has been held to be a libel. *Per* Wilmot, C. J., in *Villers* v. *Mousley*, 2 Wils., 403. In *Cropp* v. *Hilney*, 3 Salk., Holt, C. J., thus lays down the law: "That scandalous matter is not necessary to make a libel; it is enough if the defendant induce a bad opinion to be had of the plaintiff, or make him contemptible

or ridiculous." And Bayley, J., declares in *McGregor* v. *Thwaites*, 3 Barn. & C., 33, that "an action is maintainable for slander, either written or printed, provided the tendency of it be to bring a man into hatred, contempt, or ridicule." To the same effect are the decisions in 6 Bing., 409, *The Archbishop of Tuam* v. *Robeson;* and in 4 Taunt., 355, *Thorley* v. *The Earl of Kerry*. In every instance of slander, either verbal or written, malice is an essential ingredient: it must in either be expressly or substantially averred in the pleadings; and whenever thus substantially averred, and the language, either written or spoken, is proved as laid, the law will infer malice until the proof, in the event of denial, be overthrown, or the language itself be satisfactorily explained. The defence of the defendants in error, the defendants likewise in the Circuit Court, is rested upon grounds forming, it is said, an established exception to the rule in ordinary actions for libel; grounds on which the decision of the Circuit Court is defended in having excluded from the jury, under the declarations in these cases, the writings charged in them as libellous. These writings were offered as evidence of express malice in the defendants. The exception relied on belongs to a class which, in the elementary treatises, and in the decisions upon libel and slander, have been denominated privileged communications or publications. We will consider, in the first place, the peculiar character of such communications, and the extent of their influence upon words or writings as to which, apart from that character, the law will imply malice. Secondly, we will examine the burden or obligation imposed by the law upon the party complaining to remove presumptions which might seem to be justified by the occasion of such communications, and to develop their true nature. And lastly, we will compare the requirements of the law with the character of the publication before us, and with the proceedings of the Circuit Court in reference thereto. The exceptions found in the treatises and decisions before alluded to, are such as the following: 1. Whenever the author and publisher of the alleged slander acted in the *bona fide* discharge of a public or private duty, legal or moral; or in the prosecution of his own rights or interests. For example, words spoken in confidence and friendship, as a caution; or a letter written confidentially to persons who employed A. as a solicitor, conveying charges injurious to his professional character in the management of certain concerns which they had intrusted to him, and in which the writer of the letter [*287 was also interested. *2. Anything said or written by a master in giving the character of a servant who has been in

his employment. 3. Words used in the course of a legal or judicial proceeding, however hard they may bear upon the party of whom they are used. 4. Publications duly made in the ordinary mode of parliamentary proceedings, as a petition printed and delivered to the members of a committee appointed by the House of Commons to hear and examine grievances.

But the term "exceptions," as applied to cases like those just enumerated, could never be interpreted to mean that there is a class of actors or transactions placed above the cognisance of the law, absolved from the commands of justice. It is difficult to conceive how, in society where rights and duties are relative and mutual, there can be tolerated those who are privileged to do injury *legibus soluti;* and still more difficult to imagine, how such a privilege could be instituted or tolerated upon the principles of social good. The privilege spoken of in the books should, in our opinion, be taken with strong and well-defined qualifications. It properly signifies this, and nothing more. That the excepted instances shall so far change the ordinary rule with respect to slanderous or libellous matter, as to remove the regular and usual presumption of malice, and to make it incumbent on the party complaining to show malice, either by the construction of the spoken or written matter, or by facts and circumstances connected with that matter, or with the situation of the parties, adequate to authorize the conclusion. Thus in the case of *Cockayne* v. *Hodgkisson*, 5 Car. & P., 543, we find it declared by Parke, Baron, "That every wilful and unauthorized publication injurious to the character of another is a libel; but where the writer is acting on any duty legal or moral, towards the person to whom he writes, or is bound by his situation to protect the interests of such person, that which he writes under such circumstances is a privileged communication, unless the writer be actuated by malice." So in *Wright* v. *Woodgate*, 2 Cromp. M. & R., 573, it is said, "a privileged communication means nothing more than that the occasion of making it rebuts the *prima facie* inference of malice arising from the publication of matter prejudicial to the character of the plaintiff, and throws upon him the onus of proving malice in fact; but not of proving it by extrinsic evidence only; he has still a right to require that the alleged libel itself shall be submitted to the jury, that they may judge whether there is evidence of malice on the face of it." In regard to the second example mentioned, viz., that of a master giving the character of a servant, although this is a privileged communication, it is said by Lord Mansfield in *Weatherstone* v. *Hawkins*, 1 T. R., 110, and by Parke, J., in *Child* v. *Affleck*, 9 Barn. & C., 406,

that if express malice be shown, the master will not be excused. And the result of these authorities, with many others which bear upon this head is this, that if the conduct of the defendant entirely consists *of an answer to an inquiry, the absence of malice will be presumed, unless [*288 the plaintiff produces evidence of malice; but if a master unasked, and officiously gives a bad character to a servant, or if his answer be attended with circumstances from which malice may be inferred, it will be a question for the jury to determine, whether he acted *bona fide* or with malice.

With respect to words used in a course of judicial proceeding, it has been ruled that they are protected by the occasion, and cannot form the foundation of an action of slander without proof of express malice; for it is said that it would be matter of public inconvenience, and would deter persons from preferring their complaints against offenders, if words spoken in the course of their giving or preferring their complaint, should be deemed actionable; per Lord Eldon in *Johnson* v. *Evans*, 3 Esp., 32; and in the case of *Hodgson* v. *Scarlett*, 1 Barn. & Ald., 247, it is said by Holroyd, J., speaking of the words of counsel in the argument of a cause, "If they be fair comments upon the evidence, and relevant to the matter in issue, then unless malice be shown, the occasion justifies them. If, however, it be proved that they were not spoken *bona fide*, or express malice be shown, then they may be actionable." Abbot, J., in the same case remarks, "I am of opinion that no action can be maintained unless it can be shown that the counsel availed himself of his situation maliciously to utter words wholly unjustifiable." In relation to proceedings in courts of justice, it has been strongly questioned whether, under all circumstances, a publication of a full report of such proceedings will constitute a defence in an action for a libel. In the case of *Curry* v. *Walter*, 1 Bos. & P., 525, it was held that a true report of what passed in a court of justice was not actionable. The same was said by Lord Ellenborough in *Rex* v. *Fisher*, 2 Campb., 563; but this same judge in *Rex* v. *Crevy*, 1 M. & S., 273, and Bayley, J., in *Rex* v. *Carlisle*, dissented from this doctrine as laid down in *Curry* v. *Walter*, observing that it must be understood with very great limitations; and by Tindal, C. J., in the case of *Delegal* v. *Highly*, 3 Bing., N. C., 690, it is said "to be an established principle upon which the privilege of publishing the report of any judicial proceeding is admitted to rest, that such report must be strictly confined to the actual proceedings in court, and must contain no defamatory observations or comments from any quarter whatsoever in addition to what forms strictly

and properly the legal proceedings." So a publication of the result of the evidence is not privileged; the evidence itself must be published. Neither is a publication of a counsel's speech unaccompanied by the evidence. *Lewis* v. *Walker*, 4 Barn. & Ald., 605; *Flint* v. *Pike*, Id., 473.

Publications duly made in the ordinary course of parliamentary proceedings have been ruled to be privileged, and therefore not actionable. As where a false and scandalous libel was contained in *a petition which the defendant caused to be printed and delivered to the members of the committee appointed by the House of Commons to hear and examine grievances, it was held not to be actionable. Such appears to be the doctrine ruled in *Lake* v. *King*, 1 Saund., 163; and the reason there assigned for this doctrine is, that the libel was in the order and course of proceedings in the Parliament, which is a court. The above case does certainly put the example of a privileged communication more broadly than it has been done by other authorities, and it seems difficult from its very comprehensive language, to avoid the conclusion, that there might be instances of privilege which could not be reached even by the clearest proof of express malice. The point, however, appearing to be ruled by that case, is so much in conflict with the current of authorities going to maintain the position that express malice cannot be shielded by any judicial forms, that the weight and number of these authorities should not, it is thought, be controlled and even destroyed by the influence of a single and seemingly anomalous decision. The decision of *Lake* v. *King* should rather yield to the concurring opinions of numerous and enlightened minds, resting as they do upon obvious principles of reason and justice. The exposition of the English law of libel given by Chancellor Kent in the second volume of his Commentaries, part 4th, p. 22, we regard as strictly coincident with reason as it is with the modern adjudications of the courts. That law is stated by Chancellor Kent, citing particularly the authority of Best, J., in the case of *Fairman* v. *Ives*, 5 Barn. & Ald., 642, to the following effect: "That petitions to the king, or to parliament, or to the secretary of war, for redress of any grievance, are privileged communications, and not actionable libels, provided the privilege is not abused. But if it appears that the communication was made maliciously, and without probable cause, the pretext under which it was made aggravates the case, and an action lies." It is the undoubted right we know of every citizen to institute criminal prosecutions, or to exhibit criminal charges before the courts of the country; and such prosecutions are as much the regular and

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appropriate modes of proceeding as the petition is the appropriate proceeding before parliament—yet it never was denied, that a prosecution with malice, and without probable cause, was just foundation of an action, though such prosecution was instituted in the appropriate court, and carried on with every formality known to the law. The parliament, it is said, is a court, and it is difficult to perceive how malicious and groundless prosecutions before it can be placed on a ground of greater impunity than they can occupy in another appropriate forum. The case of *Lake* v. *King*, therefore, interpreted by the known principles of the law of libel, would extend the privilege of the defendant no farther than to require as to him proof of actual malice. A different interpretation would establish, as to such a case, a rule that is perfectly anomalous, and *depending upon no reason which is applicable to other cases of privilege. [*290

By able judges of our own country, the law of libel has been expounded in perfect concurrence with the doctrine given by Chancellor Kent. Thus, in the case of the *Commonwealth* v. *Clap*, 4 Mass., 169, it is said by Parsons, C. J., "that a man may apply by complaint to the legislature to remove an unworthy officer; and if the complaint be true, and made with honest intentions of giving information, and not maliciously, or with intent to defame, the complaint will not be a libel. And when any man shall consent to be a candidate for a public office conferred by the election of the people, he must be considered as putting his character in issue, so far as it may respect his fitness and qualifications for the office; and publications of the truth on the subject, with the honest intention of informing the people, are not a libel; for it would be unreasonable to conclude, that the publication of truths, which it is the interest of the people to know, should be an offence against their laws. For the same reason, the publication of falsehood and calumny against public officers, or candidates for public offices, is an offence dangerous to the people, and deserves punishment, because the people may be deceived, and reject their best citizens, to their great injury, and, it may be to the loss of their liberties. The publication of a libel maliciously, and with intent to defame, whether it be true or not, is clearly an offence against law on sound principles, &c."

In the case of *Bodwell* v. *Osgood*, 3 Pick. (Mass.), 379, it was ruled, that a false complaint, made with express malice, or without probable cause, to a body having competent authority to redress the grievance complained of, may be the subject of an action for a libel, and the question of malice is to be determined by the jury. The court in this last case say, p. 384,

"It may be admitted, that if the defendant had proceeded with honest intentions, believing the accusation to be true, although in fact it was not, he would be entitled to protection, and that the occasion of the publication would prevent the legal inference of malice." The court proceed further to remark, p. 385: "It has been argued that the jury should have been instructed, that the application to a tribunal competent to redress the supposed grievance was *prima facie* evidence that the defendant acted fairly, and that the burden of proof was on the plaintiff to remove the presumption. The judge was not requested thus to instruct the jury. He did, however, instruct them that the burden of proof was on the plaintiff to satisfy them that the libel was malicious, and that if the plaintiff did not prove the malice beyond any reasonable doubt, that doubt should be in favor of the defendant."

We have thus taken a view of the authorities which treat of the doctrines of slander and libel, and have considered those authorities *particularly with reference to the distinction they establish between ordinary instances of slander, written and unwritten, and those which have been styled privileged communications; the peculiar character of which is said to exempt them from inferences which the law has created with respect to those cases that do not partake of that character. Our examination, extended as it may seem to have been, has been called for by the importance of a subject most intimately connected with the rights and happiness of individuals, as it is with the quiet and good order of society. The investigation has conducted us to the following conclusions, which we propound as the law applicable thereto. 1. That every publication, either by writing, printing, or pictures, which charges upon or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous, or odious, or ridiculous, is *prima facie* a libel, and implies malice in the author and publisher towards the person concerning whom such publication is made. Proof of malice, therefore, in the cases just described, can never be required of the party complaining beyond the proof of the publication itself: justification, excuse, or extenuation, if either can be shown, must proceed from the defendant. 2. That the description of cases recognised as privileged communications, must be understood as exceptions to this rule, and as being founded upon some apparently recognised obligation or motive, legal, moral, or social, which may fairly be presumed to have led to the publication, and therefore *prima facie* relieves it from that just implication from which the general rule of the law is deduced. The rule of evidence, as to such

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cases, is accordingly so far changed as to impose it on the plaintiff to remove those presumptions flowing from the seeming obligations and situations of the parties, and to require of him to bring home to the defendant the existence of malice as the true motive of his conduct. Beyond this extent no presumption can be permitted to operate, much less be made to sanctify the indulgence of malice, however wicked, however express, under the protection of legal forms. We conclude then that malice may be proved, though alleged to have existed in the proceedings before a court, or legislative body, or any other tribunal or authority, although such court, legislative body, or other tribunal, may have been the appropriate authority for redressing the grievance represented to it; and that proof of express malice in any written publication, petition, or proceeding, addressed to such tribunal, will render that publication, petition, or proceeding, libellous in its character, and actionable, and will subject the author and publisher thereof to all the consequences of libel. And we think that in every case of a proceeding like those just enumerated, falsehood and the absence of probable cause will amount to proof of malice.

The next and the only remaining question necessary to be considered in these cases, is that which relates to the rulings of the *court below excluding the publication [*292 declared upon as a libel from going to the jury in connection with other evidence to establish the existence of malice. We forbear any remark upon the intrinsic character of the injury complained of, or upon the extent to which it may have been made out. These are matters not properly before us. But if the publication declared upon was to be regarded as an instance of privileged publications, malice was an indispensable characteristic which the plaintiff would have been bound to establish in relation to it. The jury, and the jury alone, were to determine whether this malice did or did not mark the publication. It would appear difficult *à priori* to imagine how it would be possible to appreciate a fact whilst that fact was kept entirely concealed and out of view. This question, however, need not at the present time be reasoned by the court; it has, by numerous adjudications, been placed beyond doubt or controversy. Indeed, in the very many cases that are applicable to this question, they almost without an exception concur in the rule, that the question of malice is to be submitted to the jury upon the face of the libel or publication itself. We refer for this position to *Wright* v. *Woodgate*, 2 Crompt., M. & R., 573; to *Fairman* v. *Ives*, 5 Barn. & Ald., 642; *Robinson* v. *May*, 2 Smith, 8; *Flint* v. *Pike*, 4 Barn. &

C., 484, per Littledale, J.; Id., 247, *Bromage* v. *Prosser*; *Blake* v. *Pilford*, 1 Moo. & R., 198; *Parmeter* v. *Coupland*, 6 Mees. & W., 105; *Thomson* v. *Shackell*, 1 Moo. & M., 187. Other cases might be adduced to the same point.

Upon the whole we consider the opinion of the Circuit Court, in the several instructions given by it in these cases, to be erroneous. We therefore adjudge that its decision be reversed; that these causes be remanded to the said court, and that a *venire facias de novo* be awarded to try them in conformity with the principles herein laid down.

Ex Parte, The City Bank of New Orleans in the matter of William Christy, Assignee of Daniel T. Walden, a Bankrupt.

This court has no revising power over the decrees of the District Court sitting in bankruptcy; nor is it authorized to issue a writ of prohibition to it in any case except where the District Court is proceeding as a court of admiralty and maritime jurisdiction.[1]

The District Court, when sitting in bankruptcy, has jurisdiction over liens and mortgages existing upon the property of a bankrupt, so as to inquire into their validity and extent, and grant the same relief which the state courts might or ought to grant.[2]

The control of the District Court over proceedings in the state courts upon such liens, is exercised, not over the state courts themselves, but upon the parties, through an injunction or other appropriate proceeding in equity.[3]

[1] Applied. *Crawford* v. *Points*, 13 How., 11. Followed. *Ex parte Easton*, 5 Otto, 72, 77. Reviewed and Approved. *Ex parte Gordon*, 1 Black, 505. Cited. *Ex parte Graham*, 10 Wall., 543.

The Circuit Court has power to issue a writ of prohibition only in cases where such writ is necessary for the exercise of its jurisdiction. *In re Binninger*, 7 Blatchf., 159; *Markson* v. *Heaney*, 1 Dill., 497, 507.

[2] Followed. *Norton* v. *Boyd*, 3 How., 437; *Houston* v. *City Bank of New Orleans*, 6 Id., 506. Cited. *Ray* v. *Norseworthy*, 23 Wall., 134.

Congress has full power to provide for a complete administration over the assets of the bankrupt. *Goodall* v. *Tuttle*, 3 Biss., 219, 232; *In re Wallace*, Deady, 433, 436; *Markson* v. *Heaney*, 1 Dill., 497, 503, 505; *Carr* v. *Gale*, 3 Woodb. & M., 38, 65. The United States District Court may take possession of the goods of the bankrupt by its officers and sell them. *In re Kahley*, 2 Biss., 383, 389; *Foster* v. *Ames*, 1 Low., 313, 317; *Mahard* v. *Lafayette Bank*, 3 McLean, 587, 589; *In re Davis*, 1 Sawy., 260.

[3] See *Carroll* v. *Carroll*, 16 How., 287; *In re Davis*, 1 Sawy., 263.

The rule announced that the court seeks to control the person of the litigant and not the action of the court in which he litigates, is a well known illustration of the rule adopted by courts of equity in granting injunctions to prevent a plaintiff or defendant from wrongfully proceeding in a foreign court. The power was long doubted in England, but finally firmly established in the case of *Lonce* v. *Baker*, Freem. Ch., 125; s. c. Nels., 103; 1 Ch. Cas., 67. That was an action to enjoin a suit at Leghorn. So to prevent the defendant from entering a judgment in the Court of Session of

Ex parte Christy.

*The design of the Bankrupt Act was to secure a prompt and effectual administration of the estate of all bankrupts, worked out by the courts of the United States, without the assistance of state tribunals.[4]

The phrase in the 6th section, "any creditor or creditors who shall claim any debt or demand under the bankruptcy," does not mean only such creditors who come in and prove their debts, but all creditors who have a present subsisting claim upon the bankrupt's estate, whether they have a security or mortgage therefor or not.

Such creditors have a right to ask that the property mortgaged shall be sold, and the proceeds applied towards the payment of their debts; and the assignee, on the other hand, may contest their claims.

In the case of a contested claim, the District Court has jurisdiction, if resort be had to a formal bill in equity or other plenary proceeding; and also jurisdiction to proceed summarily.[5]

THIS was a motion on behalf of the City Bank of New Orleans, for a prohibition, to be issued to the District Court of the United States for the district of Louisiana.

The suggestion for the prohibition stated the following as facts in the case:

First. That Daniel T. Walden, of the city of New Orleans, on the 27th July, 1839, and on the 17th day of August, 1839, executed two several mortgages to the City Bank of New Orleans, on a certain plantation, and on lots of land in said state, to secure payment of $200,000 borrowed of said bank; which mortgages were duly recorded, and in all respects good

Scotland. *Wharton* v. *May*, 5 Ves., 71; *Campbell* v. *Houlditch*, referred to in 3 Myl. & K., 108; or from proceeding in the courts of Ireland on a bill of exchange. *Portarlington* v. *Soulby*, 3 Myl. & K., 104; *Beauchamp* v. *Marquis of Huntley*, Jac., 546; so where suit was first begun in Ireland, the plaintiff was enjoined from proceeding in a second suit for the same subject-matter, brought in England. *Parnell* v. *Parnell*, 7 Ir. Ch., 322; or that the proceedings can be more expeditiously settled in the court of the country granting the injunction. *Bunbury* v. *Bunbury*, 1 Beav., 318; affirmed, 3 Jur., 648; *Beckford* v. *Kemble*, 1 Sim. & S., 7; or where the parties have proceeded as far as a decree, proceedings in a foreign country have been enjoined. *Wedderburn* v. *Wedderburn*, 2 Beav., 208; or to restrain foreclosure proceedings where a bill to redeem is pending. *Beckford* v. *Kemble*, *supra*. See also *Canon* v. *Maclearen*, 5 H. L. Cas., 416; *Harrison* v. *Gurney*, 2 J. & W., 563; *Bowles* v. *Orr*, 1 Younge & C., 464; *Cranstoun* v. *Johnston*, 3 Ves., 182 (doubting).

The clear weight of authority in America is with the English cases; and the courts of one state, in a proper case, will enjoin a citizen of that state from proceeding in the courts of another state. *Dehon* v. *Foster*, 4 Allen (Mass.), 545; *Bank of Bellows Falls* v. *Rutland*, 28 Vt., 470; *Hays* v. *Ward*, 4 Johns. (N. Y.), Ch., 123; *Vail* v. *Knapp*, 29 Barb. (N. Y.), 299; *Keyser* v. *Rice*, 47 Md., 203; *Vermont &c. R. R. Co.* v. *Vermont Central R. R. Co.*, 46 Vt., 792; *Snook* v. *Snetzer*, 25 Ohio St., 516; *Mead* v. *Merritt*, 2 Paige (N. Y.), 402; *Mitchell* v. *Bunch*, 2 Id., 606; *Great Falls &c.* v. *Worster*, 23 N. H., 470; *Contra Williams* v. *Ayrault*, 31 Barb. (N. Y.), 364; *Burgess* v. *Smith*, 2 Barb. (N. Y.), Ch., 276; *Carroll* v. *Farmers' &c. Bank*, Harr. (Mich.), 197. But usually not to restrain proceedings touching land in a foreign jurisdiction. *Harris* v. *Pullman*, 84 Ill., 20; *Moor* v. *Anglo-Italian Bank*, 10 Ch. D., 681; *Pennell* v. *Ray*, 3 De G. M. & G., 126; *Ostell* v. *Le Paye*, 2 Id., 892.

[4] As to object of bankrupt law, see *Mitchell* v. *Great Works Milling &c. Co.*, 2 Story, 648.

[5] See *Allen* v. *Thompson*, 10 Fed. Rep., 123; *In re Hamlin*, 8 Biss., 129.

and valid, and created a good, legal, and equitable lien on the property mortgaged for payment of said debt. That, on or about 20th October, 1840, Walden instituted suit in the state District Court, to set aside said mortgages, for the same causes, substantially, as William Christy (Walden's subsequent assignee in bankruptcy) has presented by his petition and amended petition in the District Court of the United States at New Orleans, exercising summary jurisdiction in bankruptcy, to set aside the same mortgages, as per certified copy of the proceedings in the District Court of the United States herewith annexed; and the state court, on appeal, decided finally against Walden's complaint, and sustained the mortgages.

Second. That, afterward, the bank proceeded to foreclose its mortgages in the state court; and thereupon, on 17th May, 1842, an order of seizure and sale was made, and an actual seizure of the property executed on 19th May, 1842.

Third. That, on 18th June, 1842, the said Walden filed his petition for the benefit of the bankrupt act, in the District Court of the United States at New Orleans, and on the 18th July, 1842, said court decreed him to be a bankrupt.

Fourth. That, after Walden filed his petition, and before decreed a bankrupt, viz., on 27th June, 1842, he applied to the said District Court of the United States for its injunction to stay the sale ordered in the state court of the mortgaged
*294] premises; setting forth, as grounds therefor, the same facts, substantially, as subsequently again *set forth by Christy, his assignee, in his petitions aforesaid. After full hearing of said bill, the court refused the injunction; and thereafter the premises seized were duly sold, with every legal requisite and formality, in execution of the previous orders of the state court, and the City Bank became the purchasers.

Fifth. That the said bank has, in no wise, presented or proved its claim against Walden, in the bankrupt court, but pursued the said mortgage claim adversely in the state court, relying on its lien by the state law, and the proviso in the bankrupt act, saving such lien from its operation.

Sixth. That the matter in dispute exceeds two thousand dollars in value.

Seventh. That the said Christy, assignee, &c., knowing all the premises, but contriving to impair the lien of the bank by the mortgages aforesaid, contrary to the saving clause of the bankrupt act, is endeavoring, by his petition and supplemented petition, to subject all the previous proceedings of the state court upon the mortgages to review and revision in the District

Court of the United States, by its summary process in bankruptcy. And the said Christy and Walden, and the Hon. Thedore H. McCaleb, judge of the said District Court of the United States, have wrongfully and vexatiously forced the said bank to appear in said court, upon its summary process, to answer said Christy's petition. And though the bank has objected, by plea, to the summary jurisdiction of the court over the matters aforesaid, yet the court adheres—hath overruled the plea—and persists, by its summary process, to proceed with the cause, to the embarrassment of the bank, and to the deprivation of all redress by appeal.

In addition to the foregoing statement filed by the counsel in support of the motion for a prohibition, it may be proper to state that,

On the 8th of October, 1842, Christy filed the petition mentioned in the seventh proposition just quoted. It recited that Walden, the bankrupt, was, at the time of filing his schedule and surrender, the owner of a large amount of real estate; that the bank claimed to have a mortgage upon it; that the bank caused it to be sold and possession delivered; that the sale was void, because the application of Walden operates as a stay of proceeding; that the property was offered for sale in block, though composed of twenty different stores or buildings, and for cash; that the mortgage debt was not justly due, but void on account of usury; and prayed that the sale might be declared void, or if adjudged valid, that the amount thereof should be paid over to the petitioner, to be distributed according to law.

On the 31st of October, 1842, the bank filed a plea to the jurisdiction of the court, with other matters in defence.

On the 17th of February, 1843, the questions raised by the answer of the bank were adjourned to the Circuit Court of the United States.

*At April term, 1843, the Circuit Court returned the [*295 following answers:—

"In answer to the questions adjourned into this court by the District Court for the said district, it is ordered that the following answers be certified to the District Court in bankruptcy, as the opinion of the court thereupon:

"First. That the said District Court has, under the statute of bankruptcy, full and ample jurisdiction of all questions arising under the petition of William Christy, assignee of Walden, to try, adjudge, decree, and determine the same between the parties thereto.

"Secondly. That the sale made of the mortgaged property, under the seizure and sale ordered by the District Court of

the state of Louisiana, is void, and that the District Court of the United States should by its decree declare it void in the suit; and that said last-mentioned court has full power and authority to try and determine the validity of said mortgages, and if proved upon the trial void according to the laws of Louisiana, to make a decree accordingly, and order a sale of the property therein contained for the benefit of the several creditors of the bankrupt; but if upon proof said mortgages shall be sustained and adjudged valid, a decree should be rendered in favor of the mortgagees, condemning to sale all their interests, rights, all title therein, and all the interest, right, and title of the bankrupt and all the general creditors, in the hands of the assignee, and the rights and title of the assignee also; and by the order of sale the marshal be directed to pay over to the mortgagees, after deducting the per cent. for his commissions and all the legal costs of the suit, the amount of their claim, if the proceeds of the sale amount to so much, and the balance, if any, to pay over to the assignee; and that by such decree the assignee be ordered to make proper title and conveyance to the purchaser or purchasers, upon the full payment of the purchase money and a reasonable compensation to the assignee for making such conveyance, to be determined and settled by the judge of the District Court, should the purchaser or purchasers and the assignee disagree as to the amount.

"Thirdly. The second and alternative prayer in the petition of the assignee, asking the payment to him of the whole amount of the proceeds of the former sale of the mortgaged property, being inconsistent with the opinion of the court in the second point, will therefore be disregarded on the trial by the District Court. J. McKINLEY,

"Associate Justice of the Supreme Court U. S."

Afterwards, in 1843, an amended petition was filed by Christy, alleging, amongst other things, that the bank claimed to be a creditor of Walden, and "in that capacity had become a party to the said proceedings in bankruptcy," &c., &c.

*296] In December, 1843, the bank prayed oyer of the time, place, *manner, and form, where, how and when it became a party to the proceedings in bankruptcy.

The court having granted the prayer for oyer, Christy, on the 23d of January, 1844, filed the following:

"That the said City Bank became parties to the proceedings in bankruptcy of the said Walden, first, by the operation of law, they being at the time of his bankruptcy mortgage creditors of the said Walden, and placed upon his schedule as

such; second, by their own act, having filed a petition in this honorable court on the 5th September, 1842, praying that the demand of the assignee for the postponement of the sale of certain properties be disregarded, that their privileges be recognised, and that said properties be sold under an order of this court for cash; third, that an attempt was made by the said bank to withdraw said petition and prayer of 5th September, 1842, but a discontinuance of the same was opposed by M. W. Hoffman and L. C. Duncan, creditors of said bankrupt, and parties interested, by reason of which said opposition the legal effects of said application, made by the City Bank as aforesaid, to this honorable court remain in full force.

"In consideration of all which and the documents herewith filed, your petitioner prays, that said City Bank be compelled to answer to the merits of the original and supplemental petition in this case filed, without further delay."

On the 10th of February, 1844, the bank filed its answer, denying that it had ever proved its debt, or otherwise subjected itself in any manner to the summary jurisdiction of the District Court sitting as a court of bankruptcy; but on the contrary, that it had prosecuted its remedy in the state courts of Louisiana, and adding the following:

"And so these respondents and defendants say and insist, that this honorable court, sitting as a bankrupt court, and holding summary jurisdiction in matters of bankruptcy under and by virtue of said act, ought not to have and to take cognisance of the several matters and things in the said petition and supplemental petition contained: forasmuch as all jurisdiction over the same is by law vested in and does of right belong to the Circuit Court of the United States for the eastern district of Louisiana, holding jurisdiction in equity, and proceeding according to the principles and forms of courts of chancery as prescribed by law and by rules and orders of the Supreme Court of the United States, or to the District Court of the United States for the said district, proceeding in the same manner, and vested with concurrent jurisdiction over all suits at law or in equity which may be brought by the assignee of any bankrupt against any person claiming an adverse interest; which said courts are competent to entertain the suit of the petitioner and grant him the relief of prayer for, if by law he is entitled to the same, and not this court; and forasmuch as this honorable court, sitting as a bankrupt court, and deciding in a summary manner in matters of bankruptcy, is wholly *without jurisdiction in the premises, [*297 these respondents and defendants submit to the judgment of this honorable court, whether they shall be held to make any

further or other answer to the several matters and things in the said petition and suplemental petition contained, and pray to be hence dismissed, with their reasonable costs, &c."

An agreement of counsel was filed in the court below relative to the petition of the bank and its discontinuance spoken of in the oyer of Christy, as above set forth. The agreement stated that the discontinuance was ordered in open court by the counsel of the bank, and the proceedings of the court showed that a rule to show cause why the discontinuance should not be set aside was dismissed.

This was the position of the case in the court below.

The motion for a prohibition was sustained by *Wilde* and *Henderson*, and opposed by *Crittenden*. The reporter has no notes of the arguments of *Henderson* and *Crittenden*, and from that of *Wilde* only extracts can be given.

Wilde referred to the seven facts stated in the beginning of this report, and then said, the questions of law insisted on by the suggestion are,

1. That the Bankrupt Act contemplates two kinds of jurisdiction: one over parties claiming under the bankruptcy, the other over parties claiming adversely to it; the one summary, the other formal; the one exclusive in the District Court exercising summary jurisdiction in matters of bankruptcy, without appeal, as defined by section 6th; the other a concurrent jurisdiction in both District and Circuit Courts for or against parties claiming an adverse interest, according to the provisions of section 8th, which is not summary, but formal, to be exercised according to the rules and forms of chancery or common law, and subject to review in this court by appeal or writ of error under the general provisions of the laws heretofore passed regulating writs of error and appeals.

2. That the rules of said bankrupt court regulating its summary process, in pursuance of which this proceeding by Christy is assumed to be instituted and entertained, are in violation of the Bankrupt Act—which rules are herewith exhibited.

The reasons why this court should interpose to restrain the District Court from further proceedings in the matter are two:

1. Because said court, proceeding summarily on petition, as in a matter of bankruptcy, has no lawful cognisance and jurisdiction of the matter.

2. Because by permitting said court so to proceed and decide, (from which decision no appeal would lie,) would be

to permit said district and inferior court to impair the legitimate powers of this *court in its appellate jurisdiction, and to deprive the bank of its right to invoke the supervisory powers of this court by appeal.

After stating the general principles on which prohibitions issue, which were cases where an appeal does not lie, and citing a number of authorities, Mr. *Wilde* continued—

For the present, then, we are to consider whether the District Court, sitting as a bankrupt court of exclusive and summary jurisdiction of all matters arising under the bankruptcy, and deciding without appeal, has rightful and lawful cognisance of the matters it is proceeding to investigate and adjudicate upon in this case.

Here are lawful mortgages, made and recorded according to the laws of Louisiana, bearing date three years before petition of the mortgagor to be declared a voluntary bankrupt.

Here is a mortgagee who has not proved his debt under the bankruptcy, but has rested on this state lien; prosecuting that lien to judgment of foreclosure upon his said mortgages in the state court, before the petition in bankruptcy.

Here is an order of seizure and sale, and an actual levy on the mortgaged premises by the sheriff one month before the petition of the mortgagor for the benefit of the Bankrupt Act.

Under this levy or seizure the mortgagee proceeded to sell the mortgaged premises, after appraisment, advertisement, and all other legal pre-requisites, in several distinct lots, according to their separate enumeration in the mortgages and appraisement, and in as minute divisions as the nature of the property would admit or the law allow.

And the substantial question before this court is, whether he who has never proved his debt, never came in under the bankruptcy, can be dragged into the District Court, sitting as a bankrupt court, and exercising summary jurisdiction, without appeal; his writ of seizure and sale annulled, the judgment of the state court vacated, the sale set aside, and his mortgages declared null and void, though the Supreme Court of the state have declared them good and valid.

The mere statement of such a question would seem to be enough to decide it; but its very simplicity leads to the suspicion of error, and therefore we will verify it step by step.

First then, the proceedings in bankruptcy, of which we produce an authenticated copy, and the clerk's certificate, show exclusively that the City Bank has never proved its debt against Walden. See transcript of the petition, schedule, &c., in bankruptcy—clerk's certificate, last page.

We hold it to be clear law, that a party holding a mortgage

cannot be compelled to prove his debt, or come in under the commission; and we hold that unless he does so, the District Court, exercising the powers of a bankrupt court, and proceeding summarily without appeal, has no jurisdiction over him.

*299] "If a creditor has a security or lien, he is not compellable to *come in under the commission; he may elect to stand out, and rely on his security or lien.

"But if he does prove, he relinquishes his security for the benefit of all." Cullen on Bankruptcy, 145, 149.

If this be the case in England, *à fortiori*, it is so under our late bankrupt act, which contains a clause saving state liens. Section 2, p. 16, Bankrupt Act:—

"Nothing in this act contained shall be construed to annul, destroy, or impair any liens, mortgages, or other securities or properties, real or personal, which may be valid by the laws of the states respectively."

In the decisions under this law, although there has been a diversity of opinion as to what constituted a lien, there has been none that a mortgage was one.

There has been no diversity of opinion on the point whether a mortgaged creditor could be compelled to prove or not.

There has been some difference of opinion how, and in what court, and by what process or form of proceeding, the state lien is to be saved; but all agree that saved it must be.

On the score of authority, it cannot be expected we should do more than produce the decisions of circuit or district judges. These questions have not yet been adjudicated in this court.

We rely on the following cases, decided by judges of this court on their circuits, or by district judges, respectable for learning and ability.

The decision of Mr. Justice Baldwin in the matter of *Kerlin*, a bankrupt, reported in the United States Gazette, of Philadelphia, of 26th October, 1843.

The decision of Mr. Justice Story, in the case of *Mitchell, assignee of Roper* v. *Winslow and others*, in the Circuit Court of Maine, reported in the Law Reporter of Boston, for December, 1843, pp. 347, 360.

Mr. Justice McLean's decision in the case of *N. C. McLean, assignee in bankruptcy* v. *The Lafayette Bank, J. S. Buckingham and others*, to be found in the Western Law Journal for October, 1843, p. 15.

Mr. Justice McLean's decision in the case of *N. C. McLean, assignee*, v. *James F. Meline*; Western Law Journal for November, 1843, p. 51.

Mr. Justice Story's decision in the case of *Muggridge*, Id.;

357; in *Ex parte Cook*, Id., 444; *Ex parte Newhall*, Id., 308; in *Dutton* v. *Freeman*, Id., 452.

Mr. Justice Thompson's decision in *Houghton* v. *Eustis*, Id., 506.

Judge Prentiss's (of Vermont) opinion in *Ex parte Spear*, Id., 399; and *Ex parte Comstock*, Id., 165.

*Judge Conkling's (of New York) opinion in *Ex parte Allen*, Id., 568. [*300

Judge Monroe's (of Kentucky) opinion in Nile's Register, 5th November, 1842; and those of Irwin, Randall, and Gilchrist, Id.

These cases, it is humbly submitted, establish the doctrine for which the defendants contend, namely: that the state lien in this case was properly and rightfully enforced under the state law and process. Penn. Law Journal for November, 1842, p. 302, *Ex parte Dudley*, Judge Randall and the late Judge Baldwin's decisions; Penn. Law Journal, April, 1844, p. 246, *Large* v. *Bosler*, District Court of Philadelphia; Law Reporter for October, 1844, p. 281, Judge Conkling's decision on *Briggs* v. *Stephens* (proving surrenders lien); Western Law Journal, April, 1844, Judge McLean's decision in *McLean* v. *Rockey*, p. 302; Law Reporter, July, 1844, Mr. Justice Story's decision in *Bellows and Peck*, United States Circuit Court of New Hampshire, pp. 125, 127; Law Reporter, June, 1844, Superior Court of New Hampshire, *Kitteridge* v. *Warren*, p. 87; Penn. Law Journal, October 15th, 1842, p. 223, Judge Randall's decision (distress); Penn. Law Journal, October 15, 1842, p. 245, Judge Randall (proof withdrawn); *Ex parte Lafeley*, Report of Kitteridge & Emerson, Sup. Court, New Hampshire.

The decision of Judge Gilchrist in the case of *McDowall's assignee* v. *Planters' and Mechanics' Bank*, of which an authenticated copy is produced.

But this court very properly holds itself entirely uncommitted by Circuit Court decisions. They are merely cases at *nisi prius*, and the matters there determined are as open to discussion as ever.

(Mr. *Wilde* then went on to argue that a mortgaged creditor could not be compelled to prove his debt, and that if he did so, he would only come in for a share of the assets *pro rata;* and then investigated the jurisdiction of the District and Circuit Courts in bankruptcy, and the revisory powers of this court by appeal or prohibition, as follows:)

In considering the authority of the District Court exercising summary jurisdiction in cases of bankruptcy, it will be most convenient and perspicuous to examine—

First. Its exclusive jurisdiction.

Secondly. Its jurisdiction concurrently with the Circuit Court.

Its exclusive jurisdiction is granted by the 6th section, which is as follows:

(Mr. *Wilde* here quoted it at length.)

To obtain a distinct idea of the extent and boundaries of the jurisdiction thus granted, it is requisite to examine them under three different aspects:

First. As to the persons over whom—that is, for or against whom—jurisdiction is given.

*301] *Secondly. As to the objects, rights, or claims, subjected to such jurisdiction.

Thirdly. As to the modes and forms of proceeding.

A careful analysis of this section will show—

First, as to persons:

That the jurisdiction granted extends—

To the bankrupt;

To the creditors claiming any debt under the bankruptcy;

To the assignee, whether in office or removed.

These parties and each of them are authorised to sue each other in the District Court, and to litigate their respective claims or pretensions there. But the court will remark, there is no jurisdiction whatever granted by this section, so far as persons are concerned, to a creditor who does not claim under the bankruptcy. No jurisdiction over such a creditor is granted: none is given for him or against him. This distinction has always been recognized by the courts of the United States wherever the point has been brought to their attention. *Briggs* v. *Stephens*, Law Rep., Oct. 1844, p. 282, per Conkling, J.; *Ex parte Dudley*, Penn. Law Journal, Nov. 19, 1842, pp. 320, 321, per Justice Baldwin; *Assignee of McDowall* v. *Planters' and Mechanics' Bank*, per Judge Gilchrist.

Secondly. As to objects, rights, claims, and controversies, subjected to the summary jurisdiction of the District Court sitting in bankruptcy.

The jurisdiction granted by this section extends—

To all controversies between the bankrupt and any creditor claiming any debt or demand under the bankruptcy;

To all controversies between such creditor and the assignee of the estate;

To all controversies between the assignee and the bankrupt; and—

To all acts, matters, and things, to be done under and by virtue of the bankruptcy.

But your honors will observe, that under this section, so far

as objects, rights, claims, or controversies are concerned, no jurisdiction is granted in controversies between the assignee and a creditor not claiming under the bankruptcy, but claiming adversely to it.

No jurisdiction is granted in controversies between such a creditor and other creditors claiming under the bankruptcy.

None in cases between a creditor claiming adversely to the bankruptcy and the bankrupt himself.

None where the acts, matters, and things are not done, or be done under and in virtue of the bankruptcy, but before it, independent of it, and adversely to it.

So far, then, as the objects of the District Court's summary jurisdiction in bankruptcy are concerned, no such jurisdiction is granted by this section over the rights or demands of a creditor who claims adversely to the bankruptcy, and not under it.

*In relation to such a creditor, so claiming such rights, he is not authorized to sue in that court either [*302 the assignee or the bankrupt, or the creditors claiming under the bankruptcy; neither, in regard to such a creditor and such rights, is the assignee or the bankrupt, or the other creditors claiming under the bankruptcy, empowered to sue him there.

Thirdly. In reference to the modes and forms of proceeding, it is indisputable that in the District Court, sitting as a bankrupt court, and holding jurisdiction in bankruptcy under the 6th and 7th sections, the proceedings are summary, and in general without appeal.

But however clearly it may appear that by the letter of the 6th section no such jurisdiction is granted for, against, or over a creditor claiming adversely to the bankruptcy, it may be said cognisance of such claims somewhere is indispensable to the full execution of a uniform system, and therefore, *ex necessitate*, it must be vested in some court of the United States.

He who objects to the jurisdiction of a court (it will be said) must show that some other court has jurisdiction. We assume that obligation and this brings us to a like analysis of the 8th section.

That section is as follows:

"Sect. 8. And be it further enacted, That the Circuit Court within and for the district where the decree of bankruptcy is passed, shall have concurrent jurisdiction with the District Court of the same district of all suits at law and in equity, which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person against such assignee, touching

any property or rights of property of said bankrupt transferable to, or vested in, such assignee; and no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years after the declaration and decree of bankruptcy, or after the cause of suit shall first have accrued."

With respect to the jurisdiction granted by this section, the court will observe it is concurrent in the District and Circuit Courts. But as some complexity and confusion are likely to arise in considering the variety of jurisdictions possessed by the same tribunal, though sitting on different sides, and proceeding by different forms, we will analyze this section as to the jurisdiction thereby granted to the Circuit Courts, with reference to the persons for or against whom it is granted, the subject-matters over which it is extended, and the modes and forms of proceeding required to be adopted.

As soon as we shall have ascertained what the jurisdiction of the Circuit Court is, under the 8th section, it will be easy to apply it to the District Court, for as the two courts under the 8th section have concurrent jurisdiction, it follows that *303] whatever jurisdiction is *granted by that section to the one is granted to the other. When the Circuit Court's jurisdiction under it is known, the District Court's jurisdiction under it is known to be the same, and we thus arrive at a clear and precise conception of the two district jurisdictions, which we allege exist in the District Court, namely:

1. Its summary jurisdiction as to parties claiming under the bankruptcy.

2. Its jurisdiction as a court of law and equity, for or against parties claiming adversely to the bankruptcy; a jurisdiction not summary, but to be exercised according to the usual modes and forms of courts of chancery or common law, according as the nature of the case made, or the relief sought, belongs to the one or the other forum.

Let us examine, then, the jurisdiction granted by the 8th section to the Circuit Court.

1. It extends to all suits of law or in equity brought by an assignee against any person claiming an adverse interest.

2. To all suits at law or in equity by such person, against such assignee, touching any property or rights of the bankrupt.

Thus we see that the very jurisdiction over persons claiming an adverse interest and rights, not arising under the bankruptcy, but in opposition to it, which the 6th section did not

grant to the District Court exercising summary jurisdiction, has been granted to the Circuit Court by the 8th section, as a court of common law and equity, proceeding according to its ordinary jurisdiction in such suits, and according to the usual modes and forms of proceeding in chancery, where a chancery remedy is sought, and of common law, where a common law remedy is adequate.

The District Court, then, as a court of summary jurisdiction, has no cognisance of cases for or against persons claiming an adverse interest, but the Circuit Court has; and the Circuit Court, as to such cases, proceeds not summarily, but according to the usual modes and forms of courts of common law or chancery.

Now the jurisdiction granted to the District Court by the 8th section is concurrent with that given to the Circuit Court by the 8th section—that is to say, it is neither more nor less, but precisely the same; to be exercised over the same parties, in the same way, and by the same rules and forms of proceeding.

There are then two distinct jurisdictions given to the District Courts, as we undertook to prove.

The one a summary jurisdiction, to be exercised over all claiming under the bankruptcy, and this jurisdiction is exclusive. The other a formal jurisdiction, coextensive with that given to the Circuit Court, for and against persons claiming adversely to the bankruptcy, which jurisdiction is not summary, but to be exercised according to the usual forms of common law or chancery.

The summary jurisdiction of the Bankrupt Court may be admitted *for the purposes of this argument, to be exclusive and without appeal. [*304

But the jurisdiction granted to the Circuit Court over persons claiming an adverse interest, is not summary, but is the ordinary jurisdiction of that court as a court of common law and chancery, extended over a new class of cases, and a new description of suitors, it is true, but to be exercised according to long-established forms; and as the only jurisdiction possessed by the District Court over persons, not parties to the bankruptcy, but claiming adversely to it, is precisely the same as that given by the 8th section to the Circuit Court, it follows that, when the District Court takes cognisance of that class of cases, its jurisdiction is to be exercised according to the usual forms of chancery and common law, by bill or suit, precisely as the Circuit Court would exercise it.

The Circuit Court in such cases cannot decide summarily, and as the jurisdiction of the District Court is the same, and

no more, as to that description of persons and controversies, the District Court cannot decide summarily.

To maintain the opposite doctrine, is to assert that a concurrent jurisdiction may be different, and greater in the one court than the other, and that the formal and summary jurisdictions of a court may be adopted and intermingled at its pleasure. It is indisputable, and conviction results from a mere inspection of the proceedings, that William Christy, the assignee, is proceeding in the District Court, sitting in bankruptcy, and according to the course of its summary jurisdiction as a bankrupt court.

The petition is so addressed, [p. 7 of the printed papers attached to the suggestion.] All the pleadings and orders in the cause are uniformly so entitled. They are "in the United States District Court, sitting in bankruptcy," pp. 7, 12, 14, 23, 24, 25, 26, 27, and 28.

Now, where the relief sought belongs to the chancery jurisdiction, it must be sought in Louisiana, as well as elsewhere, in the courts of the United States, according to the course and forms of chancery practice. *McCullum* v. *Eager*, 2 How., 63.

The proceeding of the assignee is by petition, not by bill in chancery.

The motive of his so proceeding is sufficiently obvious. If he can maintain the jurisdiction of the District Court, exercising summary jurisdiction in bankruptcy, he cuts off all appeal. He has succeeded in persuading the District Court, that the case comes under and belongs to its summary cognisance. A plea to the jurisdiction upon the very ground we are arguing, has been submitted to that court and overruled. *Vide* the plea to the jurisdiction, pp. 25, 26, of the printed record annexed to the suggestion and order overruling it, p. 26.

*305] In fine, therefore, it is manifest that William Christy the assignee, *is proceeding in the bankrupt court, according to the course of its summary jurisdiction.

The plea so expressly alleges, pp. 25, 26.

By demurring *ore tenus* to the plea, which he is held to have done, by praying judgment of the court upon it, although no formal demurrer is allowed by the law or practice of Louisiana, he admits the fact.

And the court, by overruling the plea, decide, that he is proceeding in the court of bankruptcy, according to the course of its summary jurisdiction, but that he is rightfully and lawfully proceeding there.

This is the precise point we have attempted to disprove, and

upon which we seek the judgment of this court, in the form of an order for a prohibition.

Thus, then, we think we have sustained the first branch of our argument, namely, that the District Court of the United States for the eastern district of Louisiana is proceeding in the case of *William Christy, assignee, against the City Bank of New Orleans*, without jurisdiction, and contrary to law, and in such manner as to deprive the City Bank of an important legal right.

This view is sustained by the decision of the late Mr. Justice Baldwin, *Ex parte Dudley*, P. L. J., Nov. 19, 1842, p. 297; by *Briggs* v. *Stephens*, per Conkling, J., Law Reporter, Oct., 1844, p. 282.

The decision of Mr. Justice Baldwin, in the matter of John Kerlin, reported for the United States Gazette, 26th October, 1843.

The dissenting opinion of Judge Bullard, in the case of *The State* v. *Rosanda*, p. 23, of the Printed Documents, in which it is understood Chief Justice Martin agrees, although he did not sit in the cause; and the dissenting opinion of the same judge in *Bank's* case, p. 7 of the same documents.

Assuming, therefore, that the true jurisdiction, in a case like the present, is not in the District Court proceeding summarily by petition and order, but in the United States Circuit Court for the eastern district of Louisiana sitting in chancery, or the District Court of that district having concurrent chancery jurisdiction, in cases for or against a creditor claiming adversely, under and by virtue of the 8th section of the bankrupt act, in which suit the proceeding must be by bill and answer, according to the usual chancery rules and forms.

We are next to show that in such a case an appeal would lie.

(Mr. *Wilde* went on to maintain this proposition, citing many authorities.)

We regard it, then, as established, that from the summary jurisdiction of the bankrupt court no appeal lies.

That from the chancery jurisdiction, granted by the 8th section concurrently to the Circuit and District Courts, an appeal does lie.

That the summary jurisdiction does not extend to a party claiming adversely. [*306

That the chancery does.

And that Christy, in resorting to the summary jurisdiction, does so because he has an evident interest to deprive the bank of the right of appeal, and to oust this court of its ultimate appellate jurisdiction.

All this may be true, and yet we may have no redress.

Let us now inquire if this court be competent to grant us any remedy, and whether we have sought the proper one.

We have seen, in the early part of this argument, from the English authorities, that in the King's Bench this would be clearly a case for a prohibition.

But this court, it has already been admitted, does not possess, in such cases, an authority coextensive with that of the King's Bench.

We are to show—

1st. That the exercise of such an authority is delegated to it by the Constitution and laws of the United States; and

2d. That its exercise is necessary to protect its appellate jurisdiction.

First, then:

Has the Supreme Court power to issue writs of prohibition to the lower courts of the United States generally, wherever they exceed their jurisdiction?

The 13th section of the Judiciary Act of 1789, 1 Laws U. S., 59, gives this court power to issue writs of prohibition to the District Courts, proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus* in cases warranted by law, to any courts, or persons holding office under the United States.

The 14th section gives power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, and which may be necessary for the exercise of their jurisdiction.

Now the writ of prohibition, in civil cases of common law and equity jurisdiction, is a writ not specially provided for by statute; and we undertake to show hereafter that it is necessary for the exercise of the Supreme Court's appellate powers.

The first objection we must meet is, that express authority being given to issue prohibitions in admiralty and maritime cases, it must be presumed there is no such authority in any other cases: "*expressio unius est exclusio alterius.*"

But besides the argument already used in anticipation, that the writ in common law cases is not specially provided for by statute, and therefore within the general powers granted by the 14th section, it may be remarked:—

That it would be singular, indeed, if it did not lie by our law, in all that large class of cases in which it does lie by the law of England, and *vice versa*, that in the only case where it has been sometimes held not to lie by the law of England, it does lie by our law.

*307] *Such an anomaly would be contrary to the spirit of

our whole legislation, whose tendency is to extend justice, not to barricade jurisdictions.

But why, then, was the express grant of power made to issue prohibitions in admiralty cases? Considered historically, the answer is obvious: out of abundant caution.

At that period the jealousy of a part, and a large part, of the people towards the courts of the United States, especially those not proceeding according to the course of the common law, was excessive.

The amendments made to the Constitution, and the debates of the time, are conclusive proofs of the fact.

The decisions of Lord Mansfield in *Lecaux* v. *Eden*, and *Lindo* v. *Rodney*, were made in 1781 and 1782, and in 1789 must have been well known in the United States.

They declared that a writ of prohibition did not lie from the courts of common law to a court of exclusive jurisdiction —as the Court of Prize—although it was alleged the goods belonged to a British subject, and were seized on land.

This was certainly quite enough to alarm a sensitive jealousy; and though the enactment may not have covered the whole ground of apprehension, the fair inference under all the circumstances is, that the clause in our act was adopted to extend the remedy, by prohibition, to cases which it was supposed it could not reach by the common law—to enlarge the remedy, not to contract it.

The general power to issue all other writs necessary to the exercise of their jurisdiction, is broad enough to cover prohibitions, when used as an appellate or revisory process.

(Mr. *Wilde* then went on to review and criticise the cases of *Marbury* v. *Madison*, *Weston* v. *City Council of Charleston*, 2 Pet., 464; *Cohens* v. *Virginia*, 6 Wheat., 397; and contended that the authority to issue a writ of prohibition rested upon the same ground as writs of *mandamus* and *procedendo*, viz., the necessity of protecting the appellate jurisdiction of the Supreme Court.)

If our distinction between the summary bankrupt jurisdiction and the formal chancery jurisdiction of the District Court be well taken, it follows, that when the district judge, sitting in the summary court of bankruptcy, usurps the authority of the formal chancery court, and subjects to the power persons and things belonging to the cognisance of the latter, he commits an excess of jurisdiction.

If the associate justice presiding in the Circuit Court of that district, sustains the District Court in that excess, and says, as he is supposed to have done, that it is proceeding regularly and lawfully, when in truth its proceedings are irregu-

lar and unlawful, then either this court must have power to issue a prohibition, or its authority to revise the proceedings of inferior tribunals, to confine them within the limits of their jurisdiction, and to protect their own, is so far completely nullified.

*308] *If the application for a prohibition, therefore, must first be made to the Circuit Court, and when refused there cannot be brought here by appeal, or writ of error, it follows, that although this court would have ultimate appellate jurisdiction of this cause, if regularly brought and prosecuted according to law, on the chancery side of that court, yet, if irregularly and unlawfully prosecuted on the bankrupt side, and the district judge and circuit judge erroneously sustain it there, we have no redress, and this tribunal is impotent to preserve its own ultimate appellate jurisdiction. In the language of Chief Justice Marshall, "It can neither revise the judgment of the inferior court nor suspend its proceedings." 6 Wheat., 397.

For the general practice in prohibition, we refer the court to *Croucher* v. *Collins*, 1 Saund., 136, 140, notes 1, 2, 3, 4, and 5; 2 Chit. Gen. Pr., 355; 3 Bl. Com., 355; 2 Sell. P., 425. Cases in Prohibition: 14 Petersd. Abr. verbo *Prohibition;* 2 Salk., 547; 3 Mod., 244; 6 Id., 79; 11 Id., 30. Leading Cases: *Leman* v. *Goulty*, 3 T. R., 3; *Dutens* v. *Robson*, 1 H. Bl., 100; 2 Id., 100, 107; *Leceaux* v. *Eden*, Doug., 594; *Lindo* v. *Rodney*, Id., 613. Pleadings and Forms: 6 Wentw. Plead., 242, 304; 1 Saund., 136, 142.

Mr. Justice STORY delivered the opinion of the court.

This is the case of an application on behalf of the City Bank of New Orleans to this court for a prohibition to be issued to the District Court of the United States for the district of Louisiana, to prohibit it from further proceedings in a certain case in bankruptcy pending in the said court upon the petition of William Christy, assignee of Daniel T. Walden, a bankrupt. The suggestions for the writ state at large the whole proceedings before the District Court, and contain allegations of some other facts, which either do not appear at all upon the face of those proceedings, or qualify or contradict some of the statements contained therein. So far as respects these allegations of facts, not so found in the proceedings of the District Court, we are not upon the present occasion at liberty to entertain any consideration thereof for the purpose of examination or decision, as it would be an exercise of original jurisdiction on the part of this court not confided to us by law. The application for the prohibition is made upon the ground that the

District Court has transcended its jurisdiction in entertaining those proceedings; and whether it has or not must depend, not upon facts stated dehors the record, but upon those stated in the record, upon which the District Court was called to act, and by which alone it could regulate its judgment. Other matters, whether going to oust the jurisdiction of the court, or to establish the want of merits in the case of the plaintiff, constitute properly a defence to the suit, to be propounded for the consideration of the District Court by suitable [*309 pleadings, supported by suitable *proofs, and cannot be admitted here to displace the right of the District Court to entertain the suit.

Let us then see what is the nature of the case originally presented to the District Court. It is founded upon a petition of William Christy, as assignee of Daniel T. Walden, a bankrupt, in which he states, that the bankrupt, at the time of his filing his schedule of property and surrendering it to his creditors, was in possession of a large amount of real estate, described in the petition, situate in the city of New Orleans, which was to be administered and disposed of in bankruptcy; the bankrupt having applied to the court for the benefit of the Bankrupt Act. It further states, that the City Bank of New Orleans, claiming to be a creditor of the bankrupt and to have a mortgage on the aforesaid property, the said corporation being a schedule creditor, being a party to the proceedings in bankruptcy, and being fully aware of the pendency of the same proceedings, did proceed to the seizure of the said property, and did prosecute the said seizure to a sale of the same property, the same being put up and offered for sale at public auction by the sheriff of the state District Court, on or about the 27th of June, 1842; and it was by the said sheriff declared to be struck off to the said City Bank, notwithstanding the remonstrances of the said assignee and his demands to have the same delivered up to him for the benefit of all the creditors of the bankrupt. It further avers, that the same property was illegally offered for sale, and that it is itself a nullity, and conferred no title on the said City Bank; that the sale was a fraud upon the Bankrupt Act; that the City Bank attempted thereby to obtain an illegal preference and priority over the other creditors of the bankrupt, and that the property was sold at two-thirds only of its estimated value; that the City Bank had never delegated to any person the authority to bid off the same to the said bank at the sale; and that the previous formalities required by law for the sale were not complied with, and that the property had been illegally advertised and appraised. It further avers, that the bankrupt, long prior to

his bankruptcy, was contesting the debt claimed by the said bank; and contending that the said debt was not owing by him, and the said property was not bound thereby. It further avers, that the said debt is void for usury on the part of the said bank in making the loan, the same not having been made in money, but that it was received as at par in bonds of the Municipality No. 2, which were then at depreciation at from twenty to twenty-five per cent., at their real current market value; and that the said bank had no authority to make the said contract or to accept or execute the mortgage given by the bankrupt, and that the contract and mortgage are utterly void, and should be so decreed by the court.

The prayer of the petition is, that the sheriff's adjudication of the said property may be declared null and void, and that the said property may be adjudged to form part of the *310] bankruptcy and given up *to the petitioner to be by him administered and disposed of in the said bankruptcy and according to law; that the said debt and mortgage may be decreed to be null and void, and the estate of the said bankrupt discharged from the payment thereof; and that if the said adjudication shall be held valid, and the debt and mortgage maintained by the court, then that the amount of the said adjudication may be ordered to be paid over by the said bank to the petitioner, to be accounted for and distributed by him according to law in the course of the settlement of the bankrupt's estate, and for all general and equitable relief in the premises.

To this petition the bank, by way of answer, pleaded various pleas—(1) That the District Court had no jurisdiction to decide upon the premises in the petition; (2) That the subject had already become *res judicata* in two suits of *D. T. Walden* v. *The City Bank*, and *The City Bank* v. *D. T. Walden*, in the state courts, and by the District Court upon the petition of D. T. Walden for an injunction, (not stating the nature or subject-matters of such suits, so as to ascertain the exact matters therein in controversy;) (3) That the petition contained inconsistent demands, viz.: that the sale be set aside, and that the proceeds of the sale be decreed to the petitioner; and (4) That the mortgages to the bank were valid upon adequate considerations; that the order of seizure and sale were duly granted, and the sale duly made with all legal formalities, and the property adjudicated to the bank; that the price of the adjudication was retained by the bank to satisfy the said mortgages, and that the bank became and were the lawful owners of the property. The pleas concluded with a denial of all the allegations in the petition, and prayed that

the issues in fact involved in the petition be tried by a jury. It is unnecessary for us to consider whether such a mode of pleading is allowable in any proceedings in equity, whether they are summary or plenary.

Upon this state of the pleadings the petitioner took exceptions to the answer of the bank, and three questions were adjourned into the Circuit Court for its decision. To these questions the Circuit Court returned the following answers. (See them quoted in the statement of the reporter.)

Subsequently the assignee filed a supplemental or amended petition in the District Court, stating the matters contained in the original petition more fully and at large, with more precise averments, and mainly relying thereon; and alleging, among other things, that the City Bank became a party to the proceedings in bankruptcy; and by a subsequent amendment or supplemental allegation the assignee averred that the bank became a party to the proceedings in bankruptcy, first, by operation of law, the bank being at the time of the bankruptcy mortgage creditors of the bankrupt and named in his schedule; secondly, by their own act, having filed a petition in the court, in September, 1842, praying that the [*311
demand of the assignee *for the postponement of the
sale of certain property be disregarded, that their privileges be recognized, and that the property be sold under an order of the court for cash; and that the court had since refused leave to the bank to withdraw and discontinue the latter application and petition.

To the supplemental and amended petition the bank put in an answer or plea, denying the jurisdiction of the District Court to take cognisance thereof, and insisting that they had never proved their debt in bankruptcy, but had prosecuted their remedy in the state courts against the mortgaged property, relying upon their mortgage as a lien wholly exempted from the operation of the bankruptcy by the express terms of the Bankrupt Act; that the District Court, sitting as a bankrupt court, and holding summary jurisdiction in matters of bankruptcy under the act of Congress, ought not to take cognisance of the petition and supplemental petition, inasmuch as all jurisdiction over the premises is by law vested in and of right belongs to the Circuit Court of the United States for the eastern district of Louisiana, holding jurisdiction in equity, and proceeding according to the forms and principles of chancery as prescribed by law, or to the District Court of the United States, proceeding in the same manner, and vested with concurrent jurisdiction over all suits at law or in equity brought by an assignee against any person claiming an adverse

interest, which courts are competent to entertain the suit of the petitioner and grant him the relief prayed for, if by law entitled to the same, and not this court; and the bank, therefore, prayed the said petition and supplemental petition to be dismissed for want of jurisdiction.

The District Court affirmed its jurisdiction, considering that the matters of the plea had been already determined by the decree of the Circuit Court already referred to, and overruled the plea, and ordered the bank to answer to the merits of the cause.

It is at this stage of the proceedings, so far as the record before us enables us to see, that the motion for the prohibition has been brought before this court for consideration and decision. Upon the argument the principal questions which have been discussed are, first, what is the true nature and extent of the jurisdiction of the District Court sitting in bankruptcy? secondly, whether if the District Court has exceeded its jurisdiction in the present case, a writ of prohibition lies from this court to that court to stay farther proceedings? Each of these questions is of great importance, and the first in an especial manner having given rise to some diversity of opinion in the different circuits, and lying at the foundation of all the proceedings in bankruptcy, is essential to be decided in order to a safe and just administration of justice under the Bankrupt Act.

In the first place, then, as to the jurisdiction of the District Court in matters of bankruptcy. Independent of the Bank-
*312] rupt Act of 1841, ch. 9, the District Courts of the United States possess no *equity jurisdiction whatsoever; for the previous legislation of Congress conferred no such authority upon them.[1] Whatever jurisdiction, therefore, they now possess is wholly derived from that act. And, as we shall presently see, the jurisdiction thus conferred is to be exercised by that court summarily in the nature of summary proceedings in equity.

The obvious design of the Bankrupt Act of 1841, chap. 9, was to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period. For this purpose it was indispensable that an entire system adequate to that end should be provided by Congress, capable of being worked out through the instrumentality of its own courts, independently of all aid and assistance from any other tribunals over which it could exercise no effectual control. The 10th section of the act declares, that in order to ensure a

[1] CITED. *Morgan* v. *Thornhill*, 11 Wall., 80.

speedy settlement and close of the proceedings in each case in bankruptcy, it shall be the duty of the court to order and direct a collection of the assets, and a reduction of the same to money, and a distribution thereof at as early periods as practicable, consistently with a due regard to the interests of the creditors, and that such distribution of the assets, so far as can be done consistently with the rights of third persons having adverse claims thereto, shall be made as often as once in six months; and that all the proceedings in bankruptcy in each case, if practicable, shall be finally adjusted, settled, and brought to a close by the court, within two years after the decree declaring the bankruptcy. By another section of the act, (§ 3,) the assignee is vested with all the rights, titles, powers, and authorities, to sell, manage, and dispose of the estate and property of the bankrupt, of every name and nature, and to sue for and defend the same, subject to the orders and directions of the court, as fully as the bankrupt might before his bankruptcy. By another section, (§ 9,) all sales, transfers, and other conveyances of the bankrupt's property, and rights of property, are required to be made by the assignee at such times and in such manner as shall be ordered and appointed by the court in bankruptcy. By another section, (§ 11,) the assignee is clothed with full authority, by and under the order and direction of the proper court in bankruptcy, to redeem and discharge any mortgage, or other pledge, or deposit, or lien upon any property, real or personal, and to tender a due performance thereof, and to compound any debts or other claims or securities due or belonging to the estate of the bankrupt.

From this brief review of these enactments it is manifest that the purposes so essential to the just operation of the bankrupt system, could scarcely be accomplished except by clothing the courts of the United States sitting in bankruptcy with the most ample powers and jurisdiction to accomplish them; and it would be a matter of extreme surprise if, when Congress had thus required the end, *they should [*313 at the same time have withheld the means by which alone it could be successfully reached. Accordingly we find that by the 6th section of the act it is expressly provided, "that the District Court in every district shall have jurisdiction in all matters and proceedings in bankruptcy arising under this act, and any other act which may hereafter be passed on the subject of bankruptcy, the said jurisdiction to be exercised summarily in the nature of summary proceedings in equity; and for this purpose the said District Court shall be deemed always open. And the district judge may adjourn any point or ques-

tion arising in any case in bankruptcy into the Circuit Court for the district, in his discretion, to be there heard and determined; and for this purpose the Circuit Court of such district shall also be deemed always open." If the section had stopped here, there could have been no reasonable ground to doubt that it reached all cases where the rights, claims, and property of the bankrupt, or those of his assignee, are concerned, since they are matters arising under the act, and are necessarily involved in the due administration and settlement of the bankrupt's estate. In this respect the language of the act seems to have been borrowed from the language of the Constitution, in which the judicial power is declared to extend to cases arising under the Constitution, laws, or treaties of the United States. But the section does not stop here, but in order to avoid all doubt it goes on to enumerate certain specific classes of cases to which the jurisdiction shall be deemed to extend, not by way of limitation, but in explanation and illustration of the generality of the preceding language. The section further declares: "And the jurisdiction hereby conferred on the District Court shall extend to all cases and controversies in bankruptcy arising between the bankrupt and any creditor or creditors, who shall claim any debt or demand under the bankruptcy; to all cases and controversies between such creditor or creditors and the assignee of the estate, whether in office or removed; and to all acts, matters, and things, to be done under and in virtue of the bankruptcy until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy." This last clause is manifestly added in order to prevent the force of any argument that the specific enumeration of the particular classes of cases ought to be construed as excluding all others not enumerated, upon the known maxim, often incorrectly applied, *expressio unius est exclusio alterius.* The 8th section of the act further illustrates this subject. It is there provided, "that the Circuit Court within and for the district where the decree of bankruptcy is passed, shall have concurrent jurisdiction with the District Court of the same district, of all suits at law and in equity which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person against such assignee
*314] touching any property or rights of property of such bankrupt transferable to or vested in such *assignee." Now, this clause certainly supposes either that the District Court, in virtue of the 6th section above cited, is already in full possession of the jurisdiction, in the class of cases here mentioned, at least so far as they are of an equitable

nature, and then confers the like concurrent jurisdiction on the Circuit Court, or it intends to confer on both courts a coextensive authority over that very class of cases, and thereby demonstrates that Congress did not intend to limit the jurisdiction of the District Court to the classes of cases specifically enumerated in the 6th section, but to bring within its reach all adverse claims. Of course, in whichever court such adverse suit should be first brought, that would give such court full jurisdiction thereof, to the exclusion of the other, but in no shape whatsoever can this clause be construed otherwise to abridge the exclusive jurisdiction of the District Court over all other "matters and proceedings in bankruptcy arising under the act," or over "all acts, and matters and things to be done under and in virtue of the bankruptcy."

One ground urged in the declinatory plea of the bank to the supplemental petition, and also in the argument here, is, that the District Court would have had jurisdiction in equity over the present case, if the suit had been by a formal bill and other plenary proceedings according to the common course of such suits in the Circuit Court, but that it has no right to sustain the suit in its present form of a summary proceeding in equity. Now, without stopping to consider whether the petition of the assignee in the present case is not in substance, and for all useful purposes, a bill in equity, it is clear that the suggestion has no foundation whatsoever in the language or objects of the 6th or 8th sections of the Bankrupt Act. There is no provision in the former section authorizing or requiring the District Court to proceed in equity otherwise than "summarily in the nature of summary proceedings in equity;" and that court is by the same section clothed with full power and authority, and indeed it is made its duty, "from time to time to prescribe suitable rules, and regulations, and forms of proceedings, in all matters in bankruptcy," subject to the revision of the Circuit Court; and it is added: "And in all such rules, and regulations, and forms, it shall be the duty of the said courts to make them as simple and brief as practicable, to the end to avoid all unnecessary expenses, and to facilitate the use thereof by 'the public at large.'" If any inference is to be drawn from this language, it is, not that the District Court should in any case proceed by plenary proceedings in equity in cases of bankruptcy, but that the Circuit Court should, by the interposition of its revising power, aid in the suppression of any such plenary proceedings if they should be attempted therein. The manifest object of the act was to provide speedy proceedings, and the ascertainment and adjustment of all claims and rights in favor of or against the bankrupt's estate,

in the most expeditious manner, *consistent with justice and equity, without being retarded or obstructed by formal proceedings, according to the general course of equity practice, which had nothing to do with the merits.

Another ground of objection insisted on in the argument is that the language of the 6th section, where it refers to "any creditor, or creditors, who shall claim any debt or demand under the bankruptcy," is exclusively limited to such creditors as come in and prove their debts under the bankruptcy, and does not apply to creditors who claim adversely thereto. If this argument were well founded, it would be sufficient to say, that the case would then fall within the concurrent jurisdiction given by the 8th section already cited, and therefore not avail for the City Bank. But we do not so interpret the language. When creditors are spoken of "who claim a debt or demand under the bankruptcy," we understand the meaning to be that they are creditors of the bankrupt, and that their debts constitute present subsisting claims upon the bankrupt's estate, unextinguished in fact or in law, and capable of being asserted under the bankruptcy in any manner and form which the creditors might elect, whether they have a security by way of pledge or mortgage therefor or not. If they have a pledge or mortgage therefor, they may apply to the court to have the same sold, and the proceeds thereof applied towards the payment of their debts *pro tanto*, and to prove for the residue; or, on the other hand, the assignee may contest their claims in the court, or seek to ascertain the true amount thereof, and have the residue of the property, after satisfying their claims, applied for the benefit of the other creditors. Still, the debts or demands are in either view debts or demands under the bankruptcy, and they are required by the Bankrupt Act to be included by the bankrupt in the list of the debts due to his creditors when he applies for the benefit of the act; so that there is nothing in the language or intent of the 6th section to justify the conclusion which the argument seeks to arrive at. The 5th section of the Bankrupt Act is framed *diverso intuitu*. It does not speak of creditors who shall claim any debt or demand under the bankruptcy, but it uses other qualifying language. The words are: "All creditors coming in and proving their debts under such bankruptcy in the manner hereinafter prescribed, the same being *bona fide* debts, shall be entitled to share in the bankrupt's property and effects *pro rata*, &c.; and no creditor or other person coming in or proving his debt or other claim, shall be allowed to maintain any suit at law or in equity therefor, but shall be deemed thereby to have waived all right of action and suit against such bank-

rupt." But this provision by no means interferes with the right of any creditor to proceed against the assignee under the bankruptcy to have the benefit of any mortgage, pledge, or other security, *pro tanto* for his debt, if he elects so to do, or with the rights of the assignee to redeem the *same or otherwise to contest the validity of the debt or security under the bankruptcy. [*316

It is also suggested that the proviso of the 2d section of the act declares, "That nothing in this act shall be construed to annul, destroy, or impair any lawful rights of married women or minors, or any liens, mortgages, or other securities on property, real or personal, which may be valid by the laws of the states respectively, and which may not be inconsistent with the provisions of the 2d and 5th sections of this act;" and that thereby such liens, mortgages, and other securities are saved from the operation of the Bankrupt act, and by inference from the jurisdiction of the District Court. But we are of opinion that the inference thus attempted to be drawn, is not justified by the premises. There is no doubt that the liens, mortgages, and other securities within the purview of this proviso, so far as they are valid by the state laws, are not to be annulled, destroyed, or impaired under the proceedings in bankruptcy; but they are to be held of equal obligation and validity in the courts of the United States as they would be in the state courts. The District Court, sitting in bankruptcy, is bound to respect and protect them. But this does not and cannot interfere with the jurisdiction and right of the District Court to inquire into and ascertain the validity and extent of such liens, mortgages, and other securities, and to grant the same remedial justice and relief to all the parties interested therein as the state courts might or ought to grant. If the argument has any force, it would go equally to establish, that no court of the United States, neither the Circuit Court, nor the District Court, could entertain any jurisdiction over any such cases, but that they exclusively belong to the jurisdiction of the state courts. Such a conclusion would be at war with the whole theory and practice under the judicial power given by the Constitution and laws of the United States. The rights and the remedies in such cases are entirely distinct. While the former are to be fully recognized in all courts, the latter belong to the *lex fori*, and are within the competency of the national courts equally with the state courts.

Let us sift this argument a little more in detail. The 8th section of the Bankrupt Act (as we have already seen) confers on the Circuit Court concurrent jurisdiction with the District Court of all suits at law and in equity brought by the

assignee against any person claiming an adverse interest, and *e converso* by such person against the assignee. Now, the argument at the bar supposes, that a creditor having any lien, mortgage, or other security, falls within the category here described as having an adverse interest. Assuming this to be true, (on which we give no opinion; and the clause certainly does include persons claiming by titles paramount and not under the bankrupt,) still it must be admitted that, under the 8th section, a bill in equity may be brought by or against such
*317] creditor in the Circuit Court to redeem or foreclose, or to enforce, or to set *aside such a lien, mortgage, or other security. If it can be, then the lien, mortgage or other security, is not saved from the cognisance of the Circuit Court having jurisdiction in bankruptcy, but the most ample remedies lie there; and although the rights of such creditors are to be protected, they are subject to the entire examination and decision of the court as much as they would be, if brought before the court in the exercise of its ordinary jurisdiction. If, then, the jurisdiction over such liens, mortgages, and securities exists in the Circuit Court, it follows from the very words of the Bankrupt Act, that the District Court has a concurrent jurisdiction to the same extent and with the same powers.

But it is objected, that the jurisdiction of the District Court is summary in equity and without appeal to any higher court. This we readily admit. But this was a matter for the consideration of Congress in framing the act. Congress possess the sole right to say what shall be the forms of proceedings, either in equity or at law, in the courts of the United States; and in what cases an appeal shall be allowed or not. It is a matter of sound discretion, and to be exercised by Congress in such a manner as shall in their judgment best promote the public convenience and the true interests of the citizens. Because the proceedings are to be in the nature of summary proceedings in equity, it by no means follows, that they are not entirely consistent with the principles of justice and adapted to promote the interest as well as the convenience of all suitors. Because there is no appeal given, it by no means follows, that the jurisdiction is either oppressive or dangerous. No appeal lies from the judgments either of the District or Circuit Court in criminal cases; and yet within the cognisance of one or both of those courts are all crimes and offences against the United States, from those which are capital down to the lowest misdemeanors, affecting the liberty and the property of the citizens. And yet there can be no doubt that this denial of appellate jurisdiction is founded in a wise protective public

policy. The same reasoning would apply to the appellate jurisdiction from the decrees and judgments of the Circuit Court, which are limited to cases above $2000, and cases below that sum embrace a large proportion of the business of that court.

But, in the present instance, the public policy of confiding the whole jurisdiction to the District Court without appeal in ordinary cases requires no elaborate argument for its vindication. The district judges are presumed to be entirely competent to all the duties imposed upon them by the Bankrupt Act. In cases of doubt or difficulty, the judges have full authority given to them to adjourn any questions into the Circuit Court for a final decision. That very course was adopted in the present case. In the next place, in one class of cases, that of adverse interests between the assignee and third persons, either party is at liberty to institute original proceedings in the Circuit Court, if a prior suit has not been brought therefor, *in the District Court. So that here the act [*318 has afforded effectual means to have the aid and assistance of the judge of the Circuit Court, wherever it may seem to be either expedient or necessary to solve any questions of importance or difficulty, and it has also secured to parties having an adverse interest a right at their election to proceed in the District or the Circuit Court for any remedial justice which their case may require. On the other hand, the avowed policy of the Bankrupt Act, that of ensuring a speedy administration and distribution of the bankrupt's effects, would (as has been already suggested) be greatly retarded, if not utterly defeated by the delays necessarily incident to regular and plenary proceedings in equity in the District Court, or by allowing appeals from the District Court to the Circuit Court in all matters arising under the Bankruptcy.

It is farther objected that, if the jurisdiction of the District Court is as broad and comprehensive as the terms of the act justify according to the interpretation here insisted on, it operates or may operate to suspend or control all proceedings in the state courts either then pending or thereafter to be brought by any creditor or person having any adverse interest to enforce his rights or obtain remedial redress against the bankrupt or his assets after the bankruptcy. We entertain no doubt that, under the provisions of the 6th section of the act, the District Court does possess full jurisdiction to suspend or control such proceedings in the state courts, not by acting on the courts, over which it possesses no authority; but by acting on the parties through the instrumentality of an injunction or other remedial proceedings in equity upon due application made by the assignee and a proper case being

laid before the court requiring such interference. Such a course is very familiar in courts of chancery, in cases where a creditors' bill is filed for the administration of the estate of a deceased person, and it becomes necessary or proper to take the whole assets into the hands of the courts for the purpose of collecting and marshalling the assets, ascertaining and adjusting conflicting priorities and claims, and accomplishing a due and equitable distribution among all the parties in interest in the estate. Similar proceedings have been instituted in England in cases of bankruptcy; and they were without doubt in the contemplation of Congress as indispensable to the practical working of the bankrupt system. But because the District Court does possess such a jurisdiction under the act, there is nothing in the act which requires that it should in all cases be absolutely exercised. On the contrary, where suits are pending in the state courts, and there is nothing in them which requires the equitable interference of the District Court to prevent any mischief or wrong to other creditors under the bankruptcy, or any waste or misapplication of the assets, the parties may well be permitted to proceed in such suits and consummate them by proper decrees and judgments, especially where there is no suggestion of any fraud or injus-
*319] tice on the part of the plaintiffs in those *suits. The act itself contemplates that such suits may be prosecuted and further proceedings had in the state courts; for the assignee is by the 3d section authorized to sue for and defend the property vested in him under the bankruptcy, "subject to the orders and directions of the District Court," "and all suits at law and in equity then pending in which such bankrupt is a party, may be prosecuted and defended by such assignee to its final conclusion in the same way and manner and with the same effect as they might have been by the bankrupt." So that here the prosecution or defence of any such suits in the state courts is obviously intended to be placed under the discretionary authority of the District Court. And in point of fact, as we all know, very few, comparatively speaking, of the numerous suits pending in the state courts at the time of the bankruptcy ever have been interfered with, and never, unless some equity intervened which required the interposition of the District Court to sustain or protect it.[1]

It would be easy to put cases in which the exercise of this authority may be indispensable on the part of the District Court, to prevent irreparable injury, or loss, or waste, of the assets, without adverting to the case at bar, where, upon the

[1] FOLLOWED. *Claflin* v. *Houseman*, 3 Otto, 135.

allegations in the petition and supplemental petition, the creditors of the bankrupt are attempting to enforce a mortgage asserted to be illegal and invalid, and to procure a forced sale of the property by the sheriff, in an illegal and irregular manner, thereby sacrificing the interest of the other creditors under the bankruptcy. Let us put the case of numerous suits pending, or to be brought in the state courts, upon different mortgages, by the mortgagees, upon various tracts of land and other property, some of the mortgages being upon the whole of the tracts of land or other property; some upon a part only thereof; some of them involving a conflict of independent titles; some of them involving questions as to the extinguishment, or satisfaction, or validity, of the debts; and some of them involving very doubtful questions as to the construction of the terms and extent of the conveyances. If all such suits may be brought by the separate mortgagees, in the different state tribunals, and the mortgagees cannot be compelled to join in, or to be made parties defendant to one single bill, (as is certainly the case in those states where general equity jurisdiction is not given to the state courts,) it is most obvious that, as each of the state tribunals may or must proceed upon the single case only before it, the most conflicting decisions may be made, and gross and irreparable injustice may be done to the other mortgagees, as well as to the general creditors under the bankruptcy. All this, however, is completely avoided, by bringing the whole matters in controversy between all the mortgagees before the District, or Circuit Court, making them all parties to the summary proceedings in equity, and thus enabling the court to marshal the rights, and priorities, and claims, of all the parties, and by a sale and other proceedings, after satisfying *the just claims of all the mort- [*320
gagees, applying the residue of the assets, if any, for the benefit of the general creditors. Similar considerations would apply to other liens and securities, held by different parties in the same property, or furnishing grounds of conflict and controversy as to their respective rights and claims.

Besides, how is the bankrupt court or the assignee, in a great variety of cases of liens, mortgages, and other securities, to ascertain the just and full amount thereof after the deduction of all payments and equitable set-offs, unless it can entertain a suit in equity, for a discovery of the debts, and payments, and set-offs, and grant suitable relief in the premises? The bankrupt is not, in his schedule, bound to specify them; and if he did, *non constat* that the other parties would admit their correctness, or that the general creditors would admit their validity and amount. The 11th section of the

act gives the assignee full power and authority, by and under the order and direction of the proper court in bankruptcy, to redeem and discharge any mortgage or other pledge, or deposit or lien, upon any property, and to tender a due performance of the conditions thereof. But how can this be effectually done, unless the bankrupt court and assignee can, by proceedings in that very court, ascertain what is the amount of such mortgage, or pledge, or deposit, or lien, and what acts are to be done as a performance of the mortgage, or pledge, or deposit, through the instrumentality of a suit in the nature of a summary proceeding in equity for a discovery and relief? If we are told that resort may be had to the state courts for redress, one answer is, that in some of the states no adequate jurisdiction exists in the state courts, since they are not clothed with general jurisdiction in equity. But a stronger and more conclusive answer is, that Congress did not intend to trust the working of the bankrupt system solely to the state courts of twenty-six states, which were independent of any control by the general government, and were under no obligations to carry the system into effect. The judicial power of the United States is, by the Constitution, competent to all such purposes; and Congress, by the act, intended to secure the complete administration of the whole system in its own courts, as it constitutionally might do.

Let us look at another provision of the act already referred to, which declares, "that in order to insure a speedy settlement and close of the proceedings in each case in bankruptcy, it shall be the duty of the court to order and direct a collection of the assets, and a reduction of the same to money, and a distribution thereof, at as early periods as practicable." Now here again, it may be repeated, that the end is required, and can it be doubted that adequate means to accomplish the end are intended to be given? Construing the language of the 6th section as we construe it, adequate means are given; construing it the other way, and it excludes the jurisdiction, if not of the whole subject, at least of the most important
*321] parts of *the system, and they are left solely to the cognisance of the tribunals of twenty-six different states, no one of which is bound by the acts of the others, or is under the control of the national courts. If it be admitted, (what cannot well be denied,) that the District Court may order a sale of the property of the bankrupt, under this section, how can that sale be made safe to the purchasers, until all claims thereon have been ascertained and adjusted? How can any distribution of the assets be made, until all such claims are definitively liquidated? How can the proceedings be brought

to a close at all, far less within the two years, unless all parties claiming an interest, adverse or otherwise, can be brought before the bankrupt court, to assert and maintain them? Besides, independently of the delays which must necessarily be incident to a resort to state tribunals to adjust the matters and rights affected by or arising in bankruptcy, considering the vast number of cases pending in those courts, in the due administration of their own jurisprudence and laws, there could hardly fail to be a conflict in the decisions, as to the priority and extent of the various claims of the creditors, pursuing their remedies therein in distinct and independent suits, and perhaps, also, in different state tribunals of co-ordinate jurisdiction. These are but a few of the cases which may be put to show the propriety, nay, the necessity, of the jurisdiction of the District Court to the full extent of reaching all cases arising out of the bankrupt act.

The truth is, (as has been already asserted,) that in no other way could the bankrupt system be put into operation, without interminable doubts, controversies, embarrassments, and difficulties, or in such a manner as to achieve the true end and design thereof. Its success was dependent upon the national machinery being made adequate to all the exigencies of the act. Prompt and ready action, without heavy charges or expenses, could be safely relied on, when the whole jurisdiction was confided to a single court, in the collection of the assets; in the ascertainment and liquidation of the liens and other specific claims thereon; in adjusting the various priorities and conflicting interests; in marshalling the different funds and assets; in directing the sales at such times and in such a manner as should best subserve the interests of all concerned; in preventing, by injunction or otherwise, any particular creditor or person, having an adverse interest, from obtaining an unjust and inequitable preference over the general creditors, by an improper use of his rights or his remedies in the state tribunals; and finally, in making a due distribution of the assets, and bringing to a close, within a reasonable time, the whole proceedings in bankruptcy. Sound policy, therefore, and a just regard to public as well as private interests, manifestly dictated to Congress the propriety of vesting in the District Court full and complete jurisdiction over all cases arising, or acts done, or matters involved, in the due administration and final settlement of the bankrupt's [*322 estate; and it is accordingly, in our judgment, *designedly given by the 6th section of the act. In this view of the matter, the District Court has not exceeded its jurisdiction in

entertaining the present suit, but it has full power and authority to proceed to the due adjudication thereof upon its merits.

This view of the subject disposes also of the other question made at the bar, whether this court has jurisdiction to issue a writ of prohibition to the District Court in cases in bankruptcy, if it has exceeded its proper jurisdiction. As the District Court has not exceeded its jurisdiction in the present case, the question is not absolutely necessary to be decided. But it may be proper to say, as the point has been fully argued, that we possess no revising power over the decrees of the District Court sitting in bankruptcy; that the District Court, in the present case, has not interfered with, or in any manner evaded or obstructed, the appellate authority of this court, by entertaining the present writ; and that we know of no case where this court is authorized to issue a writ of prohibition to the District Court, except in the cases expressly provided for by the 13th section of the Judiciary Act of 1789, chap. 20, that is to say, where the District Courts are "proceeding as courts of admiralty and maritime jurisdiction."

Upon the whole, the motion for a writ of prohibition is overruled.

Mr. Justice CATRON.

By the 14th section of the Judiciary Act this court has power to issue writs proper and necessary for the exercise of its jurisdiction; having no jurisdiction in any given case, it can issue no writ: that it has none to revise the proceedings of a bankrupt court is our unanimous opinion. So far we adjudge; and in this I concur. For further views why the prohibition cannot issue, I refer to the conclusion of the principal opinion. But a majority of my brethren see proper to go further, and express their views at large on the jurisdiction of the bankrupt court. In this course I cannot concur; perhaps it is the result of timidity growing out of long established judicial habits in courts of error elsewhere, never to hazard an opinion where no case was before the court, and when that opinion might be justly arraigned as extra-judicial, and a mere dictum by courts and lawyers; be partly disregarded while I was living, and almost certainly be denounced as undue assumption when I was no more. A measure of disregard awarded with an unsparing hand, here and elsewhere, to the dicta of state judges under similar circumstances: and it is due to the occasion and to myself to say, that I have no doubt the dicta of this court will only be treated with becoming respect before the court itself, so long as some of the

judges who concurred in them are present on the bench; and afterwards be openly rejected as no authority—as they are not.

The case standing in the District Court of Louisiana will test it as well as another. The application for a prohibition was brought *before us at last term; then the late Mr. Justice Baldwin was here, and one other of the judges now present was then absent; had the matter not then been laid over on advisement, and a decision been had adverse to our jurisdiction to award the writ; and an opinion been expressed by the majority of the judges then present, against the legality of the proceeding in the bankrupt court, declaring it void, and that in the state court valid; would the bankrupt court be bound to conform to such opinion; would it overrule the instructions given in the particular case by the Circuit Court on the questions adjourned, dismiss the petition of Christy, the assignee, and let the decree and sale foreclosing the mortgage made by the state court stand? Will the bankrupt court of Pennsylvania be bound, either judicially or in comity, by the opinion now given by a majority of the judges present, to overthrow that of Mr. Justice Baldwin in the case hereto appended; or is it bound to conform? Are the bankrupt courts in all the districts that have held the state proceedings on liens to be valid, and not subject to their supervision, now bound to suppress such proceedings on the suggestion of assignees that they were erroneous or inconvenient, regardless of proof, as was done in Louisiana, and thereby overhaul cases in great numbers supposed to be settled? Certainly not. This court has no power over the bankrupt courts, more than they have over this court; the bankrupt law has made them altogether independent, and their decrees as binding as ours, and as final. We have as little power to control them as the state courts have; they may concur with the reasoning of either, or neither, at discretion. I therefore think we should refrain from expressing any extra-judicial opinion on the present occasion; we did so in *Nelson* v. *Carland*, 1 How., 265, a case involving the constitutionality of the bankrupt law, and I then supposed most properly, by the majority of the court, who thought we had no jurisdiction: a more imposing application, requiring an opinion, could not have been presented, as twelve hundred cases depended on the decision of the District Court of Missouri, which was opposed to the constitutionality of the law; and to revise it the case was brought here. So in Dorr's application, at the present term, for a writ of *habeas corpus*, the same course was pursued. That application and this are not distinguishable in principle: in neither had this court power to bring a case for judgment [*323

into it; there, and here, we held nothing was before us, or could be brought before us. With this course I would now content myself, was it not that by acquiescing in silence with the opinion of my brethren I might be supposed to have agreed with them in the course pursued; and also in the views expressed in the affirmance of the jurisdiction exercised under the bankrupt law by the Circuit Court of Eastern Louisiana; to both of which my opinion is adverse, and that most decidedly. The case presented to that court was this:—

*324] *In 1839, Walden gave to the City Bank a mortgage to secure the payment of $200,000 loaned him, on a plantation and town lots.

In 1840, he instituted a suit in the District Court of the state, in New Orleans, to set the mortgage aside as void; a trial was had, and the court adjudged the mortgage valid; from this Walden appealed to the Supreme Court of Louisiana, and that court affirmed the judgment.

The bank then proceeded in the District Court of the state to foreclose the mortgage, and on the 17th of May, 1842, an order of seizure and sale was made; and an actual seizure of the property was executed on the 19th of May. The sale took place on the 27th of June.

The property was sold by lots, after appraisement, in conformity to the laws of Louisiana, and the bank became the purchaser at the price of $160,000.

That the sale was made in regular and due form, according to the modes of proceeding in the state courts, cannot be controverted.

On the 18th of June, 1842, Walden filed his petition for the benefit of the bankrupt law; and on the 18th of July was declared a bankrupt, and an assignee appointed. The $200,000 was on Walden's creditor list, but the bank refused to prove its debt, and relied on the decree of foreclosure, and the force of its lien, by the mortgage.

Christy, the assignee, filed his petition in the bankrupt court, and as part of the proceeding in bankruptcy, to have the sale declared void: 1. Because it was made after Walden applied for the benefit of the bankrupt law. 2. Because the sale had been unfairly conducted. 3. Because the proceeding in the state court was erroneous. 4. Because the debt was affected with usury, and therefore the mortgage void originally; and should be so decreed by the bankrupt court.

The bank appeared, and pleaded to the jurisdiction of the bankrupt court; and relied on the proceedings of the state court as valid by answer. Exceptions were taken to this plea

and answer, which were adjourned to the Circuit Court; there it was adjudged, and the District Court instructed:

1. That it had full and ample jurisdiction to try all the questions set forth in the petition of the assignee; and to try, adjudge, and determine the same between the parties.

2. That the seizure and sale of the state court were void; and that the District Court of the United States do declare it void.

3. That the District Court has full power and authority to try and determine the validity of the mortgage; and if proved on the trial void, to declare it so, and to make a decree ordering the property to be sold for the benefit of the creditors generally; but if found valid, the bank to have the benefit of its lien.

This decree pronounced void the judgment of the Supreme Court *of Louisiana, affirming that of the [*325 inferior court declaring the mortgage valid, and not affected with usury; which was conclusive between Walden and the bank before the bankrupt law existed. 2. It declared void the decree and order of seizure made before Walden applied for the benefit of the act—and it declared void the sale: In short, it annulled all the judgments of the state courts, and assumed to extinguish the title acquired under them; and has extinguished in form and fact, if the views of a majority of my present brethren be correct, a title indisputable according to the laws of Louisiana standing alone; this is manifest from the slightest examination of the fact, and laws applicable to them. On the 18th of July the decree declaring Walden a bankrupt was passed; up to this date he might or might not be declared a bankrupt, either at his own instance, or that of the court; therefore he was a proper party before the state court until that time; afterwards he was represented by his assignee; his property was under execution when he was declared a bankrupt; if he had then died, still the duty of the officer would have been to sell; the execution having commenced, a natural or civil death could not defeat it, as the property was in the custody of the law.

If it be true that this title is void, it follows every other is void where a sale has taken place after the defendant to the execution (issued by a state court) had applied for the benefit of the bankrupt law; and this whether the execution was awarded in the form usual to courts of law, or by decree in a court of chancery, ordering a seizure and sale by force of the decree. Every sheriff, or commissioner in chancery, executing such writ or decree, must have been a trespasser; and all persons taking under such sales deluded purchasers. In the

eighth circuit there are very many such cases beyond doubt; they are founded on my opinion acting with the district judges, who fully concurred with me, that such sales were lawful, and the titles acquired under them valid. In two other circuits at least, similar views have been entertained, and no doubt similar consequences have followed. It is therefore due to interests so extensive, affecting so many titles, that they should not be overthrown until a case calling for the authoritative adjudication of this court is presented involving them, and therefore these brief views have been expressed; not on the jurisdiction of the bankrupt courts generally; but on the precise facts presented as the grounds on which the prohibition was demanded.

On the force of the lien, and the remedy to enforce it, as a right excepted from the bankrupt law, I have said nothing, because my late brother Baldwin was called on to follow the decision given in Louisiana and refused. As he decided under the responsibility of passing on men's rights, and from whose judgment there was no appeal, his opinion is judicial, and *326] authoritative throughout his late circuit, whereas mine on the present occasion would be extra-judicial, *and therefore I append his instead of any I may entertain individually.

In the aforegoing opinion of Mr. Justice CATRON, Mr. Justice DANIEL concurs.[1]

Opinion of Mr. Justice BALDWIN, adopted by Mr. Justice CATRON as a part of his dissenting opinion.

In the matter of John Kerlin, a Bankrupt. Oct. 26, 1843.

On the 13th of May, 1843, the assignees of John Kerlin, a bankrupt, presented their petition to the judge of the District Court for the eastern district of Pennsylvania, praying for an order, authorizing them to sell certain real estate of the bankrupt, in Delaware county. On the face of the petition it appeared that at the time of the decree of bankruptcy, the property was subjected to encumbrances amounting to $14,800; that it had been sold by the sheriff of Delaware county on the 11th of May, 1843, for the sum of $8000, by virtue of proceedings issued by the Court of Common Pleas of Delaware county, under one of the mortgages recorded before the decree of bankruptcy, but the purchaser had not complied with the terms of the sale. The assignee in bankruptcy contended that the sheriff could not make title to the premises, and under a

[1] This opinion is also approved in *Matter of Davis*, 8 Bank. Reg., 170.

decision of the Circuit Court in Louisiana, claimed the right to sell. The district judge (Randall) refused to grant the order, but at request of the parties adjourned the question to the Circuit Court, where the following opinion was delivered by Baldwin, J.

The following questions have been certified by the district judge for the opinion of this court:

"1st. Does a sale by a sheriff after a decree of bankruptcy, by virtue of process issued on a judgment or mortgage, which was a lien on the property of the bankrupt before and at the time of the decree, divest the title of the assignee in bankruptcy?"

"2d. In case of a sale made by the assignee under an order of the court, if the whole of the purchase money is not sufficient to discharge the liens existing at the time of the decree, are the liens divested by such sale?"

The leading principle which has governed this court in the construction of the Bankrupt Act of 1841 has been to consider it as establishing a uniform law on the subject of bankruptcies, in the most comprehensive sense of the words as used in the Constitution, in which there is no other restriction on the power of Congress than that the laws shall be uniform throughout the United States. To make it so in its practical operation, it must be taken as it reads, its words must receive their appropriate meaning, with reference to the whole law, and the policy developed in its various provisions.

These constitute that system which it was intended [*327 to establish, *not by assuming that the design of the law was to adopt any pre-existing rules and principles found only in the former legislation of Congress, or in other countries, and then to so apply it as to effectuate a supposed policy not apparent in the law itself, nor consistent with its language, the insertion of which into the system must make it operate according to the intention of other legislatures, and require a mode of construction which will do violence to the plainest terms used to denote and declare the policy and general principles which Congress have actually established.

That the act of 1841 is anomalous in its provisions, unlike any other known in any legislation here or elsewhere, cannot be doubted. In the great outlines as well as in the details of the system, we feel the exercise of an express plenary power, competent to act at its own unlimited discretion, (so that the action be uniform,) either by adopting or modifying some old system on the subject of bankruptcy or prescribing a new one; the latter mode has seemed the better in the eye of the legis-

lature, and the duty of the judicial department is to consider its intentions and to carry it into effect.

In applying this principle to the solution of the first question now submitted, there seems no difficulty as to the policy and intentions of the law from its unequivocal language, which, as we have heretofore held, contains an express prohibition to the judicial power, not to so construe any provision as to annul, destroy, or impair any lien, mortgage, or other security, on property which is valid by the laws of the states respectively, and not inconsistent with the 2d or 5th sections.

The validity of a mortgage or judgment is submitted to no other test than these—the laws of the states and these two sections; if they stand this scrutiny, the duty of the courts is imperative. The Bankrupt Act protects all valid judgments or mortgages against any construction which shall impair them, to the same extent as the Constitution guards the obligation of contracts when attempted to be impaired by state laws. Having heretofore given this as, not the construction merely, but the inevitable result of language incapable of being mistaken in any fair reading of the last proviso in the 2d section, and stated the reasons therefor at large, it is not deemed either necessary or useful to now resume the investigation of that provision of the law, as no doubt was then or is now entertained of its meaning; see *Ex parte Dudley, et al.*, Pa. L. Jl., 302. If additional reasons could be requisite to elucidate this view of that proviso, they will be found in the 11th section, which is framed to meet its provisions—by authorizing the assignee with the order of the court, to redeem and discharge any mortgage or lien upon any property of the bankrupt, though payable at a future day, and to tender performance of its conditions.

This authority to redeem and discharge a lien presupposes its validity, that it cannot be impaired by any power of
*328] the court, and *that the assignee of the bankrupt could not take the property so bound before the lien was discharged, on any other terms than those on which it was held by the bankrupt himself, before any decree of bankruptcy had vested his rights in the assignee, else why should it have been deemed necessary to authorize him to redeem or discharge the lien, if it was not in full force as well after as before the petition or decree. Neither the proviso to the 2d or the 11th section discriminates between a lien existing before the petition filed or after it; both comprehend all liens existing at the time of the decree as burdens on the property, and contemplate the necessity of their payment in full before any other creditor can come in upon it. The only fund for their payment being

the assets of the bankrupt in the hands of the assignee, it is clear that the rights of those creditors who have liens, are, and must be, paramount to any which accrue under the bankruptcy to the assignee or general creditor. When liens are paid, then the property which they bound becomes distributable by the assignee; if not paid, the rights of the lien creditor remaining incapable of being impaired by any authority conferred by the Bankrupt Act, stands perfect as if that act had not been passed; so that if valid by the law of the state, and not inconsistent with the 2d or 5th sections of that law, they may consequently be enforced by a sale or other process conformably to the existing laws of the state for enforcing liens, which no court can annul, destroy, or impair, by any proceeding in bankruptcy. On this subject, the principles established by the Supreme Court, in the case of *Bronson* v. *Kenzie*, are replete with the soundest rules of jurisprudence and constitutional law, and directly applicable to the question now under consideration, which is, in all respects, analagous to the one then before that court on the nature of the obligation, of the extent of the mortgage and the rights of the mortgagee; and the validity of the state law, which impaired his rights to enforce the payment of the mortgage money. In that case, the court declared, that the obligation of the contract, the rights which the mortgagee acquired in the mortgage premises, depended on the then existing laws of the state, which "created and defined the legal and equitable obligation of the mortgage contract." 1 How., 315. That the Constitution equally prohibits the impairing them by a state law, acting on the remedy or directly on the contract itself, "if it so changes the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his rights and interests in it." Id., 316. "That it may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing." Id., 307. "That the rights and remedies of mortgagor and mortgagee by the law then in force, were a part of the law of the contract without any express agreement of the parties—they were annexed to the *contract at the time it was made and [*329 formed a part of it, and any subsequent law impairing the rights thus acquired, impairs the obligations which the contract imposed." Id., 319. And on these principles a state law which encumbered the remedy of the mortgagee by conditions imposed after its obligations had attached was null and void. In this case the question presented is, whether a court

of the United States, sitting in bankrputcy, can, by any rule, order, or decree, impair the right of a creditor by mortgage or judgment, to enforce the payment of his debts by a sale of the property mortgaged or encumbered by the lien of a judgment, according to the provisions of the state laws. If the right and power to sell can be taken from the creditors and conferred on the assignee of a bankrupt, who is a debtor by a mortgage or judgment existing at the time of the decree of bankruptcy; if the validity of the liens, the time, and terms of sale, and the distribution of the proceeds, can, under the bankrupt law, be determined and regulated by a judge in a proceeding in bankruptcy, from which there can be no appeal, then the remedy for enforcing a mortgage or judgment is no longer annexed to the contract or a part of it. The empty right still remains in the mortgagee, yet the remedy is taken from him by the assignee of his debtor. The final adjudication, and even his ultimate rights, and the mode of administering the remedy, is made dependent on the discretion of a judge, exercised by the summary proceedings prescribed by the Bankrupt Act, instead of the regular course of the law as administered in the courts of a state. For such a course, there is not only no warrant in the law, but it is a direct violation of the prohibition in the section, by so construing the law as to negative its express language, and taking from lien creditors, by mere judicial power, those very rights and remedies which are placed beyond its exercise, in terms positively forbidding it, in as plain and emphatic language as that in which the Constitution declares that "no state shall pass any law impairing the obligation of contracts." The principles of the Supreme Court in the case of Bronson, must be repudiated before a judge can exercise a power under the Bankrupt Act which is forbidden to a state by the Constitution. If either the obligation or the remedy is impaired, it matters not by whom it is done; nc state has any power to do it; Congress can only do it by a "uniform law on the subject of bankruptcy," nor when the law is silent can the court do it without the usurpation of legislative power. But the law is not silent; it speaks to the judge; it forbids him to do any act which impairs any lien then existing, and, in deciding the first question submitted in this case, I answer in the affirmative, and repeat the language of the Supreme Court: "and it would ill become this court under any circumstances to depart from the plain meaning of the words used, and to sanction a distinction between the
*330] right and the remedy which would render this provision illusive and nugatory; mere *words of form,

affording no protection and producing no practical result." 1 How., 318.

But were the Bankrupt Act open to construction, and the proviso of the 2d section left out of view, the result would be the same. There is no provision in the act that interferes with the laws of a state, which create and defend the obligation of a contract which is a lien on property; there is nothing which professes to effect the remedies attached to such contract, one incident of which is the power of the creditor to sell or extend as the laws of the respective states have prescribed; it requires the plenary and unlimited power of Congress over the whole subject of bankruptcies to abrogate state laws relating to liens, or to take from state courts the administration of remedies to enforce them, and above all to prohibit the creditor from resorting for his remedy to that law which prescribed it, and substituting the assignee of a bankrupt, the mere creature and servant of a judge of the District Court, in his place, without and against the will of the creditor. Congress may delegate such power to a judge or a court, but it must be in plain terms, leaving no doubt of their intention to do so; but the proposition is a bold one indeed, that judicial power is competent to do it, when the legislature has not given its sanction to its exercise; it would give the Constitution a construction which would authorize the courts to exercise the power granted to the Congress, without the passage of a law delegating it to the judicial department. So far as the Bankrupt Act, by express words, or necessary implication, affects state laws, state rights, the power of state courts, or the rights and remedies of suitors therein, it must be paramount, yet too much caution cannot be observed on this subject by the courts of the United States.

The settled course of jurisprudence in the state is to be overlooked only when such is the intention of the law; no intention to do so is to be presumed, no policy is to be assumed as the basis of the law, other than what its words indicate, and nothing is to be borrowed from any other system which is not consistent with that which Congress has thought proper to create. A leading feature of that system is the protection of all liens existing at the time of the decree of bankruptcy; they are created by contracts which by their own force create a remedy to enforce them; this remedy is the right of the creditor, the rule for its exercise is the law of the state, the power to sell in this state is the essence of both right and remedy. Congress has not impaired either, and forbidden it to be done by any construction of the Bankrupt

Act; a sale made pursuant to the laws of the state must therefore divest the title of the assignee in bankruptcy.

If the foregoing views are sound, they dispose of the two questions; an order of the court in bankruptcy can confer on the assignee no power which Congress has not conferred on the court; its powers are what the law has delegated, and none other; the law *may and must be construed where it is open to construction, but where the law itself forbids construction it must be taken and followed as it reads. If, therefore, an order of court is made that would, in its execution by an assignee, impair a lien protected by the proviso in the 2d section, it is an excess of authority, and therefore void; *à fortiori* the divesting of a lien in the case put in this question is a much higher act of power than merely impairing it by affecting the remedy. The property bound by the lien is taken from the creditor, his whole right is extinguished, and his debt is lost entirely, unless he comes in for his dividend of the assets of the bankrupt's estate.

*331]

Every principle established by the Supreme Court in the case of *Bronson*, as well as the protection given to liens by the Bankrupt Act, would be utterly prostrated, if a sale by an assignee would disencumber property mortgaged or bound by a judgment; such a doctrine would equally militate with other plain provisions of the law, which clearly point out what passes by the decree of Bankruptcy to the assignee, when it passes, the extent of his, and the power of the court, and the nature of a purchaser's title. The 3d section vests all the property and the rights of property of the bankrupt in the assignee "from the time of the decree of bankruptcy;" he then stands in the position of the bankrupt "before and at the time of his bankruptcy declared;" standing in the place of the bankrupt, the measure of his rights of property is necessarily that of the assignee, who can take nothing which did not belong to the bankrupt when the law made the conveyance of all his rights of property. To the property which was mortgaged, the only right of the assignee was to redeem it; if it was bound by judgment or other lien, the bankrupt held it subject to its payment; he could sell the equity of redemption on the land itself, subject to the lien, but the purchaser could not hold without paying it. The assignee can have no other rights by force of the decree, which is a conveyance by operation of law, than he could acquire by the deed to the bankrupt; nor could the assignee convey a greater interest than the law devolved on him; or the court by their order make his or the estate of a purchaser under him, an absolute one discharged of the lien without payment. The 11th section is

framed to meet this view of the 8d; by giving power to the court to authorize the assignee to redeem, and omitting any power to order a sale, it is manifestly intended merely to put the assignee in the place of the bankrupt, but in no other respect than enabling the assignee to appropriate the assets in his hands to disencumber the property by payment. Following the proviso in the 2d section, the 11th withholds the power of sale, as that might impair the lien; we thus find that it was deemed necessary to provide for the power of the assignee to redeem; it cannot have been intended that there should be by implication alone the higher power of sale, that in its [*332 exercise would take from the *creditor the protection given so carefully by the 2d section; the words of the 11th admit of no such construction, and even if they did, the court could not give it without overlooking the plain language of the 15th section. "And be it further enacted, that a copy of any decree of bankruptcy, and the appointment of assignee, as directed by the 3d section of this act, shall be recited in every deed of lands belonging to the bankrupt, sold and conveyed by any assignee under and by virtue of this act; and that such recital, together with a certified copy of such order, shall be full and complete evidence both of the bankruptcy and assignment therein recited, and supersede the necessity of every other proof of such bankruptcy and assignment to validate the said deed; and all deeds containing such recital, and supported by such proof, shall be as effectual to pass the title of the bankrupt of, in, and to the lands therein mentioned and described to the purchaser, as fully to all intents and purposes as if made by such bankrupt himself immediately before such order." Here is as precise and perfect a definition of the title which passes to the purchaser by a sale by the assignee under an order of court, or otherwise by virtue of the bankrupt act, with the effect thereof; "it is the same to all intents and purposes as if made by such bankrupt himself immediately before such order," in the words of the 15th section, with or without an order of sale. There is no express provision giving the court power to order a sale. The 3d section authorizes the assignee "to sell, manage, and dispose of the property, to sue for and defend the same, subject to the orders and directions of the court, as fully to all intents and purposes as if the same were vested in or might be exercised by such bankrupt before or at the time of his bankruptcy, declared as aforesaid." Connecting this with the 15th section, declaring the effect of a sale by an assignee, the answer to the second question is most obvious. Such sale has the same effect as if made by the bankrupt, and no other. It can divest no lien existing at the

time of the decree or order declaring him a bankrupt. The word "order" in the 15th section refers either to that or to the order of sale; it is not material to which. If to the decree, then the deed of the assignee conveys only such title and estate as the bankrupt then had; if to the order of sale, then that is the time to which his right is referred. But in neither case can a sale divest a lien "existing before or at the time," or "immediately" before such order. Thus taken, the Bankrupt Act is an affirmance of the universal principle as laid down by the Supreme Court in *Rankin* v. *Scott*, 12 Wheat., 179, "that a prior lien gives a prior claim, which is entitled to a prior satisfaction out of the subject it binds," unless it be defective, or the party holding it has done some act to postpone him; and that a purchaser is bound by the lien unless there is a prior act of the legislature to protect him from it. 12 Wheat., 80. The second question therefore is answered in the negative.

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*333] *WILLIAM OLIVER AND MICAJAH T. WILLIAMS AND OTHERS, APPELLANTS, *v.* ROBERT PIATT.

In cases of trust, where the trustee has violated his trust by an illegal conversion of the trust property, the *cestui que trust* has a right to follow the property into whosesoever hands he may find it, not being a *bona fide* purchaser for a valuable consideration, without notice.[1]

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[1] CITED. *Clements* v. *Moore*, 6 Wall., 316; *Ex parte Morris & Johnson*, 9 Id., 607; *Slaughter* v. *Glenn*, 8 Otto, 245; *National Bank* v. *Insurance Co.*, 14 Id., 70; *Hooley* v. *Gieve*, 9 Abb. (N. Y.), N. C., 29; s. c. 9 Daly, 115; *Abel* v. *Brown*, 55 Md., 221; *Williamson* v. *Ellis*, 12 Phil. (Pa.), 339.

The *cestui que trust* may follow the property into the hands of a mere volunteer, whether he had notice or not. *Mansell* v. *Mansell*, 2 P. Wms., 679; *Saunders* v. *Dehew*, 2 Vern., 27; s. c. 2 Freem.Ch., 123; *Pye* v. *George*, 2 Salk., 680; *Boursett* v. *Savage*, L. R. 2 Eq., 134; *Lyford* v. *Thurston*, 16 N. H., 399. But third parties cannot require the *cestui que trust* to follow the trust property into the hands of purchasers for their protection. *Barr* v. *Cubbage*, 52 Mo., 404; *Smith* v. *Bowen*, 35 N. Y., 83.

So the property may be followed into the hands of a purchaser for value if he have notice of the trust. *McLeod* v. *First National Bank*, 42 Miss., 99; *Jones* v. *Haddock*, 41 Ala., 262; *Joor* v. *Williams*, 38 Miss., 546; *Lathrop* v. *Bampton*, 31 Cal., 17; *Aynesworth* v. *Halderman*, 2 Duv. (Ky.), 655; *Ryan* v. *Doyle*, 31 Iowa, 53; *Smith* v. *Walter*, 49 Mo., 250; *Joiner v. Coving*, 17 Hun (N. Y.), 256; *Liggett* v. *Wall*, 2 A. K. Marsh. (Ky.), 149; *Denn* v. *McKnight*, 6 Halst. (N. J.), 385; *Hood* v. *Fahnstock*, 1 Pa. St., 470; *Wright* v. *Dame*, 22 Pick. (Mass.), 55; *Wigg* v. *Wigg*, 1 Atk., 382.

But a purchaser for a valuable consideration, without notice of the trust, is fully protected. *Jerrard* v. *Saunders*, 2 Ves., 457; *Fagg's* case, 1 Vern., 52; 1 Ch. Cas., 68; *Willoughby* v. *Willoughby*, 1 T. R., 763; *Boone* v. *Chiler*, 10 Pet., 177; *Varick* v. *Briggs*, 6 Paige, (N. Y.), 325; *High* v. *Batte*, 10 Yerg. (Tenn.), 335; *Halstead* v. *Bank of Kentucky*, 4 J. J. Marsh. (Ky.), 554; *Dixon* v. *Caldwell*, 15 Ohio St., 412; *Dillaye* v. *Commercial Bank*, 51

Where a trustee has, in violation of his trust, invested the trust property or its proceeds in any other property, the *cestui que trust* has his option, either to hold the substituted property liable to the original trust, or to hold the trustee himself personally liable for the breach of the trust.[2]

The option, however, belongs to the *cestui que trust* alone and is for his benefit, and not for the benefit of the trustee.[3]

If the trustee, after such an unlawful conversion of the trust property, should re-purchase it, the *cestui que trust* may, at his option, either hold the original property subject to the trust, or take the substituted property in which it has been invested, in lieu thereof. And the trustee, in such a case, has no right to insist that the trust shall, upon the re-purchase, attach exclusively to the original trust property.[4]

Where the trust property has been unlawfully invested, with other funds of the trustee, in other property, the latter in the hands of the trustee, is chargeable *pro tanto* to the amount or value of the original property.

What constitutes notice of a trust?

An agent, employed by a trustee in the management of the trust property, and who thereby acquires a knowledge of the trust, is, if he afterwards becomes possessed of the trust property, bound by the trust, in the same manner as the trustee.[5]

Where, upon the face of the title-papers, the purchaser has full means of acquiring complete knowledge of the title from the references therein made,

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N. Y., 345; *Colesbury* v. *Dart*, 58 Ala., 573; *Hamilton* v. *Mound City Mutual Life Ins. Co.*, 3 Tenn. Ch., 124; *Heilner* v. *Imbrie*, 6 Serg. & R. (Pa.), 401; *Tomkins* v. *Powell*, 6 Leigh (Va.), 576. This rule is a shield to protect, and not a sword to attack, or a cloak for fraud. And the purchaser must *clearly* show that he is an innocent purchaser for value. *Marshall* v. *Frank*, 8 Pr. Ch., 480; s. c. 1 Anstr., 14; *Dobson* v. *Leadbeater*, 13 Ves., 230; *Hardingham* v. *Nichols*, 3 Atk., 304; *Kelsal* v. *Bennett*, 1 Id., 522; *Hughes* v. *Garner*, 2 Younge & C. Exch., 328; *Hughes* v. *Garth*, Amb., 421. See *Parker* v. *Crittenden*, 37 Conn., 148.

[2] APPLIED. *Tappan* v. *Ailsworth*, 13 R. I., 585; *Brown* v. *Lambert*, 33 Gratt. (Va.), 263. DISTINGUISHED. *Linville* v. *Leininger*, 72 Ind., 494. CITED. *Smith v. Vodges*, 2 Otto, 186; *Partee* v. *Thomas*, 11 Fed. Rep., 773; *Flint* v. *Bell*, 27 Hun (N. Y.), 157.

[3] The law is well settled that the *cestui que trust* has his election, either to proceed against the trustee personally or to follow up the property which was the object of the trust. *Flagg* v. *Mann*, 3 Sumn., 475, 486; *Calhoun* v. *Burnett*, 40 Miss., 599; *Roberts* v. *Manafield*, 38 Ga., 452; *Freeman* v. *Cook*, 6 Ired (N. C.), Eq., 379; *Hawkins* v. *Hawkins*, 1 Dru. & Sm., 75; *Norman* v. *Cunningham*, 5 Gratt. (Va.), 72; *Lathrop* v. *Bampton*, 31 Cal., 17; but not against both. *Barker* v. *Barker*, 14 Wis., 131; nor can he claim profit of the actual investment for a part and the original fund and interest for the rest. *Baker v. Disbrow*, 25 Hun (N. Y.), 29; see *Gaines* v. *Ligardi*, 1 Woods, 56.

[4] The *cestui que trust* may follow the property or funds of the trust so long as it can be identified, and claim all the benefits of the new purchase, whether the title was taken in the trustee or in a third person with notice. *Ex parte Montefiore*, 9 Bank Reg., 171; *Georges* v. *Pye*, 7 Bro. C. C. 221; S. P. *Pierce* v. *McKeeham*, 3 Watts & S. (Pa.), 280; *Bush* v. *Bush*, 1 Strobh. (S. C.) Eq., 377; *Bonsall's Appeal*, 1 Rawle (Pa.), 274; *Bailey* v. *Inglee*, 2 Paige, (N. Y.), 278; *Kaufman* v. *Crawford*, 9 Watts & S. (Pa.), 234; *Heth* v. *Richmond R. R. Co.*, 4 Gratt., (Va.), 482; *Barksdale v. Finney*, Id., 338; *Turner* v. *Pettigrew*, 9 Humph. (Tenn.), 438; *Blaisdell* v. *Stevens*, 16 Vt., 179; *Moffat* v. *McDonald*, 11 Humph. (Tenn.), 457; *Bonner* v. *Mullins*, 4 Rich. (S. C.) Eq., 30; *Sollee* v. *Croft*, 7 Id., 84; *Martin* v. *Greer*, 1 Ga. Dec., 109; *Cheshier* v. *Cheshier*, 3 Ired. (N. C.), Eq., 569; *Garrett* v. *Garrett*, 1 Strobh. (S. C.) Eq., 96: *Murray* v. *Lylburn*, 2 Johns. (N. Y.) Ch., 441; *Brothers* v. *Porter*, 6 B. Mon. (Ky.), 106; *Yerger* v. *Jones*, 16 How., 36; as to investment of surplus, see *Bagemore* v. *Davis*, 55 Ga., 504.

[5] CITED. *Michoud* v. *Girod*, 4 How., 556.

to the origin and consideration thereof, he will be deemed to have constructive notice thereof.[6]

A co-proprietor of real property, derived under the same title as the other proprietors, is presumed to have full knowledge of the objects and purposes and trusts attached to the original purchase, and for which it is then held for their common benefit.

A purchaser by a deed of quit claim without any covenant of warranty, is not entitled to protection in a court of equity as a purchaser for a valuable consideration, without notice; and he takes only what the vendor could lawfully convey.[7]

A warranty, either lineal or collateral, is no bar to an heir who does not claim the property to which the warranty is attached by descent, but as a purchaser thereof.

Whether a bill in equity is open to the objection of multifariousness or not, must be decided upon all the circumstances of the particular case. No general rule can be laid down upon the subject; and much must be left to the discretion of the court.[8]

The objection of multifariousness can be taken by a party to the bill only by demurrer, or plea, or answer, and cannot be taken at the hearing of the cause. But the court itself may take the objection at any time—at the hearing or otherwise. The objection cannot be taken by a party in the appellate court.[9]

Lapse of time is no bar to a subsisting trust in real property. The bar does not begin to run until knowledge of some overt act of an adverse claim or right set up by the trustee is brought home to the *cestui que trust*. The lapse of any period less than twenty years will not bar the *cestui que trust* of his remedy in equity, although he may have been guilty of some negligence, where the suit is brought against his trustee, who is guilty of the breach of trust, or others claiming under him with notice.

Where exceptions are taken to a master's report, it is not necessary for the court formally to allow or disallow them on the record. It will be sufficient if it appears from the record, that all of them have been considered by the court, and allowed or disallowed, and the report reformed accordingly.

There is no principle of the common law which forbids individuals from associating together to purchase lands of the United States on joint account at a public sale.

THIS was an appeal from the Circuit Court of the United States for the district of Ohio, sitting as a court of equity.

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[6] APPLIED. *Villalonga* v. *Hicks*, 18 So. Car., 168.

[7] DISTINGUISHED. *Griswold* v. *Bragg*, 19 Blatch., 97; s. c. 6 Fed. Rep., 346; *White* v. *McGarry*, 2 Flipp., 574. CITED. *May* v. *Le Claire*, 11 Wall, 232; *Villa* v. *Rodriguez*, 12 Id., 339; *Dickerson v. Colgrove*, 10 Otto, 584; *Fox* v. *Hall*, 74 Mo., 316.

[8] It is impossible to lay down any general rule as to what constitutes multifariousness; but every case is governed by its own circumstances, and the court must exercise a sound discretion in the matter. *Gaines* v. *Chew*, 2 How., 619. Thus, in the case cited it was held that a bill filed against the executors of an estate, and all those who purchased from them, was not, for that reason alone, multifarious. See generally *Payne* v. *Hook*, 7 Wall, 426; *Stark* v. *Starr*, 4 Otto, 477; *Dial* v. *Reynolds*, 6 Id., 340; *West* v. *Randall*, 2 Mason, 181; *Nourse* v. *Allen*, 4 Blatchf., 376; *Horman Patent Manufacturing Co.* v. *Brooklyn City, R. R. Co.*, 15 Id., 444; *Beatty* v. *Hinckley*, 17 Id., 398; *Gaines* v. *Mausseaux*, 1 Woods, 118; *Haines* v. *Carpenter*, Id., 362; *Kilgour* v. *Gas Light Co.*, 2 Id., 145; *Copen* v. *Flesher*, 1 Bond, 440; *McLeon* v. *Lafayette Bank*, 3 McLean, 415; *Turner* v. *Amer. Baptist &c. Union*, 5 Id., 345; *Lawrence* v. *Bowman*, McAll., 419; *Gillespie* v. *Cummings*, 3 Sawy., 259; *Baker* v. *City of Portland*, 5 Id., 566; *Sheldon* v. *Keokuk &c. Co.*, 10 Biss., 473; *DeWolf* v. *Sprague Manuf. Co.*, 49 Conn., 298.

[9] ADHERED TO. *Barney* v. *Latham*, 13 Otto, 215; s. c. 2 Morr. Tr., 649; *Crocker* v. *Dillon*, 133 Mass., 102; *Mining Debris case*, 8 Sawy., 636–638.

The record was very voluminous, consisting of nearly eight hundred printed pages. The acts and declarations of the parties were given in evidence, running through a period of twenty years; and the case being an appeal from the decree of the Circuit Court, as a court of equity, all this matter was brought up to the Supreme Court. It is impossible, therefore, to put into this statement all the circumstances which had a bearing upon the point in issue, which was, whether a trust did or did not continue in a valuable body of land. The leading incidents in the history of the case are these:—

In the summer of 1817, two distinct companies were formed at Cincinnati for the purpose of purchasing lands at the public sales of the United States, to be shortly held at Wooster, in the state of Ohio; the object being to lay out and establish a town in the reserve of twelve miles square on the Miami of Lake Erie, since called the Maumee river.

One company, called the Piatt Company, was composed of the following persons: John H. Piatt, William M. Worthington, Gorham A. Worth, and Robert Piatt, the plaintiff in the suit below, and now defendant in error.

The other company was called the Baum Company and composed of the following persons: Martin Baum, Jacob Burnett, William C. Schenck, William Barr, William Oliver, (one of the plaintiffs in error,) Andrew Mack and Jesse Hunt.

What the articles of agreement were between the members of the Piatt Company the record did not show.

On the 7th of June, 1817, the Baum Company entered into the following articles of agreement—Mack being admitted to half a share, the whole interest was divided into thirteen parts, whereof Mack held one-thirteenth and each of the other persons two-thirteenths:—

"We, the undersigned, agree to enter into a partnership for the purpose of purchasing lands and lots at the public sales to be held at Wooster, on the seventh and fifteenth of July next; and for the purpose of effecting the said purchases, we agree to borrow, at the Office of Discount and Deposit at Cincinnati, the sum of eight thousand dollars, for which sum, and for all purchases made by our agents, either at the public sales or otherwise, we hold ourselves *jointly and [*335 equally liable. And we do further agree that William C. Schenck, William Barr, and William Oliver shall be our agents to explore the lands and make the purchases. And we do agree to confirm and comply with any contracts that our agents aforesaid may make on our account. And it is further agreed that our said agents shall be authorized to take in

any other partner or partners that they may see proper, on such terms as they may esteem advantageous. And it is further agreed that in consideration of the services to be performed by the agents above, their expenses, incident to making the purchases aforesaid, shall be defrayed by the other individuals comprising the company.

"In witness whereof we have hereunto set our hands and seals, at Cincinnati, this the seventh day of June, eighteen hundred and seventeen.

"MARTIN BAUM, [SEAL.]
JESSE HUNT, [SEAL.]
J. BURNET, [SEAL.]
W. C. SCHENCK, [SEAL.]
W. BARR, [SEAL.]
WILLIAM OLIVER. [SEAL.]"

The Piatt Company appointed Robert Piatt its agent.

On the 23d of June, 1817, Worthington, John H. Piatt, and Worth addressed a letter of instructions to Robert Piatt, their agent, directing him how to proceed, and enclosing $4,000 to make the first payment on the lots of land which he might purchase.

The agents having made their selections, met at Wooster to attend the sales, and then ascertained that they had each selected the following tracts, viz.: 1, 2, 3, 4, 86, and 87. In consequence of this, the following agreement was entered into, viz.:

"We, the undersigned, agree, on behalf of the companies we represent, to wit: William C. Schenck, of Warren county, Ohio, and William Oliver, of Cincinnati, Ohio, for themselves, and for Jacob Burnet, Martin Baum, Jesse Hunt, William Barr, and Andrew Mack, all of Hamilton county, Ohio; and Robert Piatt, of Boon county, Kentucky, for himself, and for William M. Worthington, John H. Piatt, and Gorham A. Worth, all of Hamilton county, Ohio, to purchase at the public sales, in July, 1817, at Wooster, lots numbered 1, 2, 3, and 4, at, and including, the mouth of Swan creek, in township No. 3, in the United States reserve, at the foot of the rapids of the Miami of the Lakes, for the joint benefit of both companies; that is, one company to have one-half interest in the whole, and the other company to have the other half; each company paying one-half of the purchase money. It is further agreed that Robert Piatt, in behalf of his company and the company of Schenck and Oliver, shall be the bidder for

lots Nos. 1 and 2, and William Oliver for lots Nos. 3 and 4, they being the above four lots at the mouth of Swan creek.

*"In witness whereof, the parties have hereunto interchangeably set their hands and seals, this 17th day of July, 1817. [*336

W. C. SCHENCK, [SEAL.]
WILLIAM OLIVER, [SEAL.]
ROBERT PIATT. [SEAL.]"

And afterwards the following:

"The undersigned have agreed to purchase, for the joint benefit of their companies, lots or tracts of land numbered 86 and 87, opposite the mouth of Swan creek, on the same principles that lots numbered 1, 2, 3, and 4, at the mouth of Swan creek, were purchased, as per agreement between William C. Schenck and William Oliver, for themselves and others, and Robert Piatt, for himself and others, bearing date 17th July, 1817.

ROBERT PIATT, [SEAL.]
WILLIAM OLIVER. [SEAL.]"

On the 18th of July, 1817, in conformity with the above agreements, William Oliver bid in lots Nos. 3 and 4, and on the 19th of July, Robert Piatt bid in tracts 1, 2, 86 and 87. The original certificates for the tracts bid in by Oliver, were made out in his name, and for the tracts bid in by Piatt, in the names of himself, John H. Piatt, Worth, and Worthington, in conformity with the letter of instructions addressed to him on the 23d of June.

On the 21st of July, 1817, Robert Piatt bid in, for the separate account of the Piatt company, the following other tracts, viz.:

North-west quarter-section 2, township 3.
South-west quarter-section 2, township 3.
South-west quarter-section 3, township 3.
North-west quarter-section 3, township 3.
South-east quarter-section 3, township 3.

The first instalment of the purchase money for which was paid by the Piatt company.

On the 4th of August, 1817, Robert Piatt settled an account with the Piatt company, giving them credit for the four thousand dollars above mentioned, and charging them with one-half of the instalments which had been paid upon Nos. 1, 2, 3, and 4, and with the whole of the instalments which had been paid upon Nos. 86 and 87, and upon the five quarter-sections.

After the return of the agents to Cincinnati, a meeting of both companies was held; the acts of the agents at Worcester

were ratified, and the two companies were, in respect to their joint purchases, consolidated in a new company called the Port Lawrence Company. Martin Baum was appointed trustee, for the purpose of carrying out a resolution of the company that a town should be laid out upon a part of the land. It was further agreed that Oliver should be appointed an agent to
*337] lay out the town and make sale of the lots; and he was directed, in performing this duty, to call to his *assistance William C. Schenck, another of the original members of the Baum Company.

Each of the companies purchased other lands upon its own private account.

On the 14th of August, 1817, Oliver executed a bond to Baum in the penal sum of twenty thousand dollars, the condition of which was as follows:

"Whereas, the above named Martin Baum hath this day constituted and appointed the before-bound William Oliver his agent, with power to lay out a town at the mouth of Swan creek, on the Miami of the Lakes, and hath authorized the said William to sell and dispose of the lots in said town, agreeably to a letter of instructions, and to receive payment for the same from the purchasers, and to execute and deliver certificates, in the nature of title bonds, for the lots by him sold. Now the condition of the above obligation is such, that if the said William Oliver shall in all things well and truly execute the trust reposed in him by the said Martin Baum, and shall render a true account of his proceedings, when required, and shall faithfully pay over to the said Martin all moneys by him received for or on account of sales made in the town to be laid off by him, as aforesaid, when thereto required, then, and in such case, the above obligation shall cease and determine, otherwise remain in full force and virtue."

On the same day, Baum executed a power of attorney to Oliver, as follows:

"Know all men by these presents, that I, Martin Baum, of Cincinnati, in the state of Ohio, for divers good causes and considerations me thereunto moving, have made, constituted, and appointed, and by these presents do make, constitute and appoint William Oliver, of said place, my true and lawful attorney, for me and in my name, to sell and dispose of the lots in a town to be laid off at Swan creek, on the Miami of the Lakes, agreeably to a letter of instructions therewith delivered, and to receive payment for the same from the purchasers, and to execute and deliver certificates, in the nature of title-bonds, for the lots by him sold, and to all lawful acts requisite for effecting the premises, hereby ratifying and con-

firming all that my said attorney shall lawfully do therein by virtue hereof. In testimony whereof," &c., &c.

On the same day Baum delivered to Oliver a letter and a set of instructions. The letter is as follows:

Cincinnati, August 14th, 1817.

"SIR:—You will observe by the power of attorney this day handed to you, that you are appointed an agent to lay out a town at the mouth of Swan creek, on the Miami of Lake Erie. Your appointment is for one year, commencing this day; for which services so rendered, you are entitled to receive from the proprietors twelve hundred dollars. And the proprietors of the lands lying in that *country, but which is [*338 a distinct concern from the above, have agreed to allow you three hundred dollars for attending to their separate business.

"Your obedient servant,

"MR. W. OLIVER." MARTIN BAUM."

The instructions were as follows:

"*Cincinnati, 14th August*, 1817.

"DEAR SIR:—As agent for the proprietors of the land recently purchased at Swan creek, you will, immediately upon the receipt of these instructions, proceed to that place, and commence the laying off a town. General Schenck, who accompanies you, will assist in the survey of the ground, in determining the site, and in the arrangement and formation of the plat. In running the streets, and in the division of the lots, it is not the wish of the proprietors that interest or convenience should be sacrificed to form; that the growth of the place should be retarded by a useless adherence to any particular figure, or to any fanciful uniformity of squares. The number of lots to be laid off may be from three to five hundred, and, with the exception of water lots and fractional sections, of about sixty feet in front, and one hundred and twenty feet in depth. The principal or central street should be at least one hundred and sixty feet wide; others from eighty to a hundred; the alleys from twelve to fifteen. Let there be three lots, each of one hundred and twenty feet square, set off for public uses, churches, schools, &c.; and one, of two hundred and forty feet square, for court-house and jail. There should also be reserved one or two suitable lots out of the town for burying grounds. It is not, however, the intention of the proprietors to tie the agent down to any specific number of feet and inches in the width of the streets or size of the lots, but they leave to him the exercise of his own judgment,

and recommend to him the use of that sound discretion which his better knowledge of the ground, and his practical information, will enable him to display, to the interest and advantage of all concerned.

"As soon as the surveys have been made, and a plat of the town formed, it is necessary that a copy of them should be immediately forwarded to the proprietors, as also a notice of the time of sale, which, if, practicable, should correspond with the time of holding the treaty with the Indians; and on this subject it is necessary that the agent should obtain the earliest information. In the disposition and arrangements of the lots for sale, let one-third of the whole number taken in different sections of the town be reserved for the use and benefit of the proprietors, or for future disposal.

"The terms of sale, one-fourth down, and the residue in three equal annual instalments, with interest from date, if not punctually paid; subject, however, to such variations as the judgment of the agent may dictate, or particular circumstances require. An immediate correspondence is to be opened *339] by the agent with Martin *Baum, Esq., of this city, who will act as trustee for the proprietors, and any information given to him in relation to the business of the agency, the sale of lots, and the progress of the town, that may be thought of any consequence to the interests of the proprietors, or that may be required by the trustee. It is the intention of the proprietors to give public notice of the time of the sale, and it is necessary that this notice should be as general and as widely spread as possible; the agent will, therefore, immediately, upon the times being fixed, forward the proper advertisement to Detroit, Buffalo, Albany, New York, Philadelphia, Pittsburg, Chillicothe, and to the trustee in this city, for publication. The instructions of the trustee are, in all respects, to be regarded as coming from the proprietors themselves.

"Wishing you a safe and pleasant journey, and an easy and prosperous management of the trust committed to your care, we remain, with great respect, &c., your obedient servant,

MARTIN BAUM,
Trustee of the Proprietors.

"To Major WM. OLIVER."

In another part of the record, the same paper is found, with a few and unimportant variations, but the names of these persons are signed to it, viz., Barr, Mack, Burnet, Worthington, Hunt, John H. Piatt, Worth and Baum.

The agents proceeded to lay out a town, and on the 20th

September, 1817, offered the lots for sale, according to the following advertisement:

"*Terms of sale.*

"Terms of sale of lots in the town of Port Lawrence: One-fourth down; the balance in three equal annual instalments, with interest from the date of purchase, if not punctually paid; and if the whole amount of the purchase money is not paid when the last instalment becomes due, the lots now purchased shall revert to the proprietors of Port Lawrence. The undersigned reserve the privilege of one bid on each lot offered.

"W. C. SCHENCK,
WILLIAM OLIVER, Agents.

"*Miami Rapids, Sept.* 20, 1817."

At the sale, seventy-nine lots were sold. Two of them, viz., Nos. 223 and 224, were purchased by Oliver himself, with the assent, as he alleged in his answer, of the company, and of Martin Baum, the trustee.

On the 5th of October, 1817, Schenck gave to Oliver the following receipt:

"*Miami Rapids, Oct.* 5, 1817.

"Received from William Oliver, agent, eight hundred and fifty-five dollars and thirty-three cents, the proceeds of sales of lots in the *town of Port Lawrence, for which I am accountable to Martin Baum of Cincinnati. [*340

"$855.33. (Signed duplicates.) W. C. SCHENCK."

In January, 1818, Oliver went to Port Lawrence, and spent the winter there. In May, 1818, he returned to Cincinnati, about which time he was elected cashier of the Miami Exporting Company, and entered upon the duties of his office on the 1st of July, 1818.

On the 14th of August, 1818, Oliver, as it was alleged by him in his answer to the bill, sold and transferred one half of his interest in the Baum Company, and also in the Port Lawrence Company, to Steele & Lytle, they assuming all outstanding liabilities; and in an early part of the ensuing spring, the remaining half of his interest in both companies to Embree & Williams.

On the 19th of September, 1818, Oliver and Worthington made a division of the lots in the town of Port Lawrence, between Martin Baum and John H. Piatt, these persons representing their respective companies. One hundred and fifty-seven lots were assigned to Piatt, and one hundred and fifty-eight to Baum.

On the 24th of April, 1820, Congress passed an act, entitled "An act making further provision for the sale of the public lands," changing the mode of selling lands from credit to cash, and reducing the price from two dollars to one dollar and twenty-five cents per acre. The effect of this law, and of the general embarrassment in the business of the country which occurred about this period, was, as it was alleged in the answer to the bill, to depress the prospects of the companies before mentioned, and the pecuniary condition of the individual members thereof, to such an extent that they resolved to abandon the lands, and forfeit them to the United States, rather than pay the instalments which were still due. But before this was done, the intention was changed by another act of Congress.

On the 2d of March, 1821, Congress passed "An act for the relief of the purchasers of public lands prior to the first day of July, 1820," which allowed a purchaser to file a relinquishment of the land so purchased, upon which the whole purchase money had not been paid, and apply the sums which had already been paid for such land, to the completion of payments which might be due upon any other land.

On the 15th of September, 1821, Oliver transferred to Baum the certificates of Nos. 3 and 4, which he had bid for at the public sale, as heretofore described; and on the 17th of September, John H. Piatt, Robert Piatt, G. A. Worth, and William M. Worthington, united in transferring to Baum the certificates Nos. 1, 2, 86, and 87, which they had bid for at the sale; and by the same instrument the last-mentioned parties also transferred to Baum the certificates for the five quarter-sections, which it has already been stated the Piatt Com-
*341] pany purchased on their own private account, at the *public sale. Both transfers were absolute, to Martin Baum, his heirs and assigns, for ever.

On the 27th of September, 1821, Baum, to whom the certificates had thus been assigned, filed by Micajah T. Williams, his attorney in fact, a relinquishment of tracts Nos. 1 and 2, and requested that the proceeds of former instalments might be applied to the completion of the payments still due upon 3, 4, 86, 87, and the five quarter-sections. The consequence of this transaction was, that as Nos. 1 and 2 had been bought at a much higher price than the other tracts, the credit acquired on the books of the government by their relinquishment was more than enough to complete the payments for all the other lands mentioned above, and a surplus existed, in the form of land-scrip, which might either have been sold or applied to a payment for other lands. Four hundred and seventy-four

dollars and fifty-nine cents of this scrip belonged to the Piatt Company, and was applied by the Baum Company in payment for lands which that company had purchased. The following is the account:

Lands surrendered.		*Lands not surrendered.*	
Tract No. 1.		Swan Creek, 3,	$607 35¾
Amt. paid on it,	$1,015 05½	" " 4,	271 73½
Tract No. 2.		" " 86,	373 31¾
Amt. paid on it,	3,802 50	" " 87,	149 96¾
		5 quarter-sections,	1,248 00

On the 27th of September, 1821, Oliver made a memorandum, or addressed a letter to some person, stating several particulars which he had attended to at Maumee, directing the land to be run out, counsel to be employed, &c., &c.

On the 20th of January, 1822, Baum presented a petition to Congress representing that he had laid out a town upon tracts Nos. 1 and 2, and sold a number of lots to persons to whom he was bound to give a title; that in consequence of the late law of Congress, reducing the price of public lands, he had been obliged to surrender them; and praying that Congress would authorize an immediate sale of those two tracts of land, so as to give him an opportunity to re-purchase them at a fair price, and thus be enabled to fulfil his engagements to those who had purchased of him.

On the 10th of September, 1822, Baum gave to Oliver the following certificate:

"*Cincinnati, Sept.* 10, 1822.

"It is hereby certified, that there is due William Oliver, from the Port Lawrence Company, two hundred and thirteen dollars and seven cents, which the said Oliver refunded, by request of the company, to purchasers of lots in Port Lawrence, the title of which has been relinquished to the United States by the company; it being the *amount [*342 due on the shares originally owned by John H. Piatt, Robert Piatt, G. A. Worth, and William M. Worthington.

"MARTIN BAUM,

"Agent for the Port Lawrence Land Company."

On the 25th of December, 1822, Baum addressed a letter to Hon. E. A. Brown, Washington City, enclosing his petition, to be again presented, and saying, amongst other things, "though it is signed by myself only, still others have an interest in it, to wit, Jacob Burnet, William Steele, M. T. Williams, S. R. Miller, John Rowan, of Kentucky; but, for the

sake of convenience, all the lands of the company were transferred to me. The petition gives a true statement of facts; the grounds why those tracts were surrendered to the United States; the injurious operation of the law of Congress (called the relief law) in the case; and the just claim which (I think) I and my associates have on the government for redress," &c., &c.

In January, 1823, Baum came into arrangements with some of those who had purchased town-lots, and to whom he was unable to give a title, agreeing for himself and his associates to re-purchase the lots and refund the money which he had received on them.

On the 3d of February, 1823, Oliver addressed the following letter to Robert Piatt, which was received by him:

"*Cincinnati, February* 3*d*, 1823.

"DEAR SIR:—I have been anxious to see you in relation to the Port Lawrence business, and was on the eve of setting off yesterday for your house, but have concluded to write, requesting the favor of your attention to the matter. In consequence of the company's securing the Port Lawrence property, they are liable to the purchasers for the money received for lots; and as some of my friends in Detroit were disposed to bear pretty hard on me for advising them to purchase, I authorized Colonel Hunt to redeem the certificates of sale from those who had purchased by my advice. The payments made in this way were upwards of $400. M. Baum's company have refunded their proportion, but my claim ($213.07, which is from the 10th of last September, 1822) against you is unsatisfied; and as we are at a loss to know the particular interest of the members of your company, I must ask the favor of your stating the present proprietors, and their respective interests in the concern. Please say when it will be convenient for you to arrange your proportion, as also to request Mr. Grandon to pay on his share or shares. Respectfully, your obedient servant, WILL. OLIVER.

"R. PIATT, Esq."

On the 6th of February, 1823, Baum addressed another letter to Mr. Brown upon the subject of his petition, representing that the case was a ruinous one to him and his associates, &c., &c.

*343] On the 3d of June, 1823, Oliver exhibited an account against *"Martin Baum and his associates," running from 1818 to June, 1823, and bringing them in debt to Oliver in the sum of $1835.47.

On the 27th of August, 1823, Baum mortgaged to Oliver tracts Nos. 3, 4, 86, and 87, to secure the payment of the above sum of $1835.47 with interest from the 1st of September, 1823. The payment was to be made on or before the 1st of January, 1824.

On the 31st of January, 1824, Baum addressed a letter to the proprietors of the Maumee and Sandusky Land Company, accompanied by an account between himself and the proprietors of Port Lawrence. The letter was as follows:

"*Cincinnati*, 31*st January*, 1824.

"To the Proprietors of the Maumee and Sandusky Land Co.

"DEAR SIR:—Enclosed, I hand you a statement of the Port Lawrence land speculation, by which you can see how that business stands, to wit, a balance due me by the company of upwards of $4755, and is daily increasing with interest. Suits have been commenced against me for the restoration of the money which was paid the company for lots, and the amount of improvements made thereon, as well as for damages. I was obliged to borrow money to compromise and quiet those claims, for fear of incurring heavy damages, great expenses, and much trouble, and probably a total loss of the company's property by sales, or judgments and executions. The lands have consequently been mortgaged for the money borrowed, and unless it is shortly refunded, the lands may yet be sold under the mortgage; it is therefore necessary that the proprietors pay to me their respective quotas, to save their lands from sale. I am extremely anxious to close this business, and therefore propose that I will exonerate you from paying any more money, if you will sell and convey me your interest in all those lands. But, lest you should think that I wish to make speculation out of you, if you will exonerate me from paying any more, I will sell you my interest in these lands, and will thank you to accept the latter proposition. It is needless to go into an explanation, as the account will do it of itself; and my proposition will satisfy you as to the prospects of gain. Please inform me soon what course you intend to pursue. Yours, respectfully,

"MARTIN BAUM."

One of these letters appears to have been directed to Mr. Robert Piatt, and another to W. M. Worthington, Esq.

On the 23d of April, 1824, Baum authorized and empowered Major William Oliver to lease, let, and rent all the lands, in and out-lots, houses, and other property which he owned, or of which he had the control, situate and being within the United

States reservation on the Maumee river for the then present season; and also to collect all rents which might be then due on all or any of the said property.

*844] *On the 28th of August, 1824, Baum addressed a letter to G. A. Worth, Esq., a part of which is as follows:

"*Cincinnati, 28th August*, 1824.

"DEAR SIR:—Your favor of the 10th April last came duly to hand—contents noticed. The land speculation has truly been an unfortunate business, and no one can be more tired of it than I am; for it's me who has to stand the brunt of the company—suits, judgments, executions, with all its attendant vexations. First, our agents were crazy in making purchases at such high rates—then the madness of Congress in reducing the price of the public lands—change of times—scarcity of money—the impossibility of managing that species of property where so many are concerned; the change of sentiments of persons in holding real estate; in fact all and every thing has operated against such speculations; and were I relieved of that concern, an immense burden would be taken off my shoulders, &c., &c."

On the 21st of September, 1825, Baum gave to Oliver the following power:

"*Cincinnati, 21st Sept.*, 1825.

"I have and hereby authorize and empower Major William Oliver to lease, let, and rent all the lands, in and out-lots, houses, and other property which I own, or of which I have the control, situate, lying, and being within the United States reservation, on the Maumee river, for the ensuing season; and also to collect all rents or other moneys due me in and about the town of Maumee and Port Lawrence.

MARTIN BAUM."

On the 5th of October, 1825, Oliver commenced proceedings in attachment in Michigan, by making the following affidavit:

"Martin Baum, agent for John H. Piatt, (since deceased,) Robert Piatt, G. A. Worth, and William M. Worthington, to William Oliver, debtor, for the sum of two hundred and thirteen $\frac{7}{100}$ dollars, being the amount refunded to purchasers of the lots in Port Lawrence, by request of said Baum, with interest from the 10th day of September, 1822.

"*Michigan, Monroe county, ss.:*

"I, William Oliver, of lawful age, do solemnly swear that

the sum mentioned in the above account is justly due from the persons therein named; that they do not reside within the territory of Michigan, and that he has reason to fear, unless an attachment issues upon the property of the persons above named, his debt cannot be recovered. WILL. OLIVER.

"Sworn this 5th day of October, 1825, before me,

"PETER P. FERRY, Justice of the Peace."

On the 7th of October, 1825, an order was filed in the office of the clerk of Monroe county court, for an attachment against the *rights and credits, moneys and effects, goods [*345 and chattels, lands and tenements of the parties above named. The writ was issued on the same day.

On the 15th of October, 1825, an attachment was laid upon the

South-west quarter of section 2, township 3.

North-west quarter of section 3, township 3.

South-west quarter of section 3.

South-west quarter of section 4.

The three first of these were included in the original purchase by Piatt and subsequent transfer to Baum. The fourth belonged to some other transaction and is not involved in this case. The whole four were appraised, collectively, at $1,200.

The suit went on, no one appearing for the defendants, until October, 1826, when it appearing that notice to defendants in attachment had been published nine months, judgment was entered against them, a *fieri facias* issued, and, on the 5th of April, 1828, the property was sold to Charles Noble for $241.60, who on the same day conveyed it to Oliver.

Having traced out the proceedings under the attachment to their consummation, it is necessary to go back to the year 1825.

On the 18th of October, 1825, Oliver filed a bill in the Supreme Court of the territory of Michigan, sitting as a court of chancery, to foreclose the mortgage which had been given by Baum on the 27th of August, 1823. Baum being a non-resident, a notice to him to appear was published for nine weeks successively in a newspaper published at Monroe.

On the 7th of December, 1827, the bill was taken *pro confesso*, and on the 5th of September, 1828, the court decreed that the property should be sold, which was accordingly done. Oliver became the purchaser, and received a deed from the register, who had been directed to make the sale.

To return again to the chronological order of events.

Congress having made a donation of land to the University of Michigan, the trustees of that institution resolved, on the

25th of June, 1827, to accept of No. 1 in lieu of a section, in the expectation that in the event that lot No. 2 should revert to the United States, then the same should be considered a part of the section to which they were entitled under the act, and requested the chairman to advertise the Treasury Department thereof.

On the 20th of July, 1827, Baum addressed a long letter to the commissioner of the General Land-office, giving a history of the Port Lawrence Company, and expressing a desire to re-possess Nos. 1 and 2. He then says, "It has been hinted that the trustees of the Seminary Lands of the Michigan Territory have had sufficient influence to delay the sale, with a view to get the privilege of locating these two tracts for that purpose. If this is the fact, I protest against such an ar-
*346] rangement. They have no claim to them whatever, but *mine is a strong one, and I am determined to pursue it in every possible way till I obtain justice."

In August, 1827, Oliver went to Detroit to ascertain if the tracts 1 and 2 could be obtained from the university, but nothing was then done.

On the 18th of October, 1827, Charles Noble wrote to Benjamin H. Piatt, one of the heirs of John H. Piatt, who had died, and enclosed him a copy of the proceedings in the attachment at the suit of Oliver.

On the 18th of February, 1828, Piatt acknowledged the receipt of this letter, and desired further information.

On the 1st of April, 1828, Noble replied, and enclosed a copy of the advertisement of the auditor for the sale of the three quarter-sections of land as before mentioned. The sale was to take place on the 5th of April, 1828.

On the 12th of August, 1828, Oliver opened a negotiation with the University of Michigan, proposing to give other lands in exchange for Nos. 1 and 2, which was prosecuted without success for some time.

On the 1st of September, 1828, Charles W. Whipple, the assistant-register of Michigan, executed to Oliver a deed for Nos. 3, 4, 86, (excepting sixty acres, which Baum had sold to Prentiss and Tromley in 1823,) and 87. The deed recited the proceedings for a foreclosure of the mortgage, and conveyed the property to Oliver, his heirs and assigns for ever.

On the 13th of January, 1830, Congress passed an act, entitled "An act to authorize the exchange of certain lots of land between the University of Michigan and Martin Baum and others."

On the 16th of August, 1830, Oliver (called in the proceedings of the board the agent of Martin Baum and others)

appeared before the trustees of the university on the subject of the exchange of lands, which subject was discussed from time to time.

In December, 1830, Oliver (having previously received an assignment of the final certificates from Baum) obtained patents for the following:

Lot No. 3.
Lot No. 4.
North-west quarter of section 3.
South-west quarter of section 3.
South-east quarter of section 3.
South-west quarter of section 2.

Being the whole of the five quarter-sections originally purchased by the Piatt Company, except the north-west quarter of section 2.

On the 7th of February, 1831, an exchange took place between Oliver and the university; the negotiation therefor having resulted in an agreement. Oliver ceded to the trustees—

Lot No. 3, except ten acres reserved:
*Lot No. 4. [*347
The north-west quarter of section 3.
The south-west quarter of section 3; and
The south-west quarter of section 2.

The university deeded to Oliver lots Nos. 1 and 2, and authorized the President of the United States to issue a patent or patents to the said William Oliver.

On the 4th of March, 1831, a patent was issued to Oliver for these lots Nos. 1 and 2.

On the 16th of May, 1831, Oliver sold to Baum and Micajah T. Williams each one undivided third part of lots Nos. 1, 2, 86, and 87, excepting sixty acres of No. 86, which had been sold by Baum to Prentiss and Tromley. Each of the two parties was to pay $1555. The necessary provision was made for laying out a town on the property where Port Lawrence was formerly laid out, making partition, &c. The 8th article was as follows: "The parties agree to admit a fourth person as a proprietor—a man of enterprise and character—on equal terms with themselves, on his establishing himself permanently at Port Lawrence, and devoting himself to the improvement of the place."

On the 19th of September, 1832, under the article just mentioned, Stephen B. Comstock was admitted to have an undivided fourth part.

On the 22d of October 1833, Oliver re-purchased from

Baum's heirs (for he had died before this time) the whole of Baum's interest under the contract of the 16th May, 1831.

On the 8th of May, 1834, Oliver and Williams sold to Edward Bissell one-fourth part of lots Nos. 1 and 2, for $7000.

On the 23d of May, 1834, Oliver sold to Williams an undivided moiety of 86 and 87.

On the 17th of October, 1834, Oliver sold to Pratt and Taylor one undivided sixteenth part of Nos. 1 and 2, for $4000. They were also to erect a warehouse, two dwelling-houses, and arrange for a line of steamboats to stop at Toledo, as the town was now called. And on the same day, he sold to Smith and Macy another undivided sixteenth, on the same terms.

On the 30th of June, 1835, Oliver sold a portion of the property to Lynde and Raymond, for $13,000; in September, 1835, another portion to Lot Clark, for $1000, and in January, 1836, another portion to Philander Raymond, for $22,000.

On the 21st of April, 1836, Robert Piatt, the appellee in the present case, filed his bill of complaint in the Circuit Court of the United States for the district of Ohio, against Oliver and others. But before narrating the proceedings under this bill, it is proper to close the history of the transactions of the parties by stating that on the 5th of May, 1837, Oliver received *348] a deed from the trustees of the University of Michigan for the property which he had given to *them in exchange as previously related. The property thus conveyed to Oliver consisted of tracts Nos. 3 and 4, the south-west quarter of section No. 2, the north-west quarter of section No. 3, and the south-west quarter of section No. 3. The consideration was $5000, and the sale was stated in the deed to be made "pursuant to a contract entered into between the said trustees and the said William Oliver, on the twenty-fourth and twenty-fifth days of October, 1834."

To return to the bill, which was filed in 1836. It made Oliver and Williams and a number of other persons, who were the representatives of the original parties, respondents, most of whom appeared. After the pleas, which were filed by the defendants, were overruled, an amended bill was filed.

These bills recite the formation of the Piatt and Baum Companies; their union in the Port Lawrence Company under the circumstances already related; the acceptance of the trust by Baum; the assignment to him of the certificates of purchase the appointment of Oliver as agent; his acceptance thereof; the instructions, bond, and power of attorney; the laying out of the town; the sales of lots, for which the respondents are called upon to account; the relinquishment of Nos. 1 and 2; the application of the credits arising therefrom to the comple-

tion of the payments due upon the other tracts; the understanding of the parties that Nos. 1 and 2 should be repurchased for the benefit of all concerned, whenever it should be possible to do so; the application to Congress; the death of John H. Piatt, in 1822; the formation, some short time thereafter, of a fraudulent combination and confederacy between Baum, as trustee, and Oliver and Williams, as agents, for the purpose of cheating the members of the Piatt Company out of their entire interest and claims; that in pursuance of this fraudulent combination Baum issued to Oliver the certificate of debt; that the complainant resided at a short distance from Cincinnati; that about that time, and prior, and long subsequently thereto, he was during some part of nearly every week in Cincinnati in company with said Baum and Oliver, or one of them; that they knew the complainant to be a man of property, well able and willing to pay his just debts; that neither Baum nor Oliver ever gave him the slightest information that any such certificate had been given; that he had received a letter from Oliver, dated on the 3d of February, 1823; that the mortgage given by Baum to Oliver was without authority, and fraudulent and void; that the assignment of the certificates for the quarter-sections was also fraudulent and void; the circumstances under which the exchange of lands took place with the University of Michigan; the circumstances also under which Williams became interested; that the proceedings in Michigan were *coram non judice* and void; that if they vested a title in Oliver, it was to constitute him a trustee for the complainant with others, and that Oliver and Williams were acting with a sole view *to benefit themselves at the expense [*349 of the complainant and the other co-proprietors.

The bill then enumerates the original parties who were dead, states their representatives and the assignees of the living, and prays that they may all be made defendants.

It then prays for an injunction, a receiver, &c., &c.

Most of the parties answered, but a notice of Oliver's and Williams's will be sufficient.

Oliver's answer admitted the formation of the Baum Company, of the Port Lawrence Company, but denied that after the sales any agreement was made to unite the interests in the several tracts; the appointment of Baum as the trustee of the Port Lawrence Company, but denied that the object of the trust was fully stated in the bill; alleged that Baum was authorized to sell and dispose of any of the property on speculation, or for payment of claims against the company, &c.; that Baum had also a right to dispose of the quarter-sections to pay the debts of the Piatt Company; admitted the instruc-

tions, except some of the signatures; the laying out of the town; the power of attorney from Baum; the letter from Baum fixing the appointment for one year, and the compensation therefor; the sale of lots in the town; alleged that he surrendered up the agency to Baum at the time of his appointment as cashier of the Miami Exporting Company, and that he then closed up his accounts; that his subsequent acts as temporary agent were only to accommodate Baum; that he and Baum had erected a warehouse on one of the lots which he had purchased at the sale, which circumstance drew him often to the town; that he had transferred one-half of his interest in the Baum Company to Steele and Lytle, in 1818, and the remaining half to Embree and Williams in 1819; admitted the relinquishment; denied the intention to re-purchase; that Baum authorized to negotiate with the university, but that he did so in his own right and upon his own account; alleged that the certificate of debt and mortgage were given upon *bona fide* considerations; that the members of the Piatt Company, and especially the complainant, were repeatedly urged to satisfy the claims and release the lands; that he, the respondent, bid the full value for the lands, and more than they would have been sold for to others for cash; that the assignment of the certificates was in good faith; explained the reasons which led to an exchange of land with the university; that he purchased back from the university the lands which he had conveyed to it, long after all agency for the companies or for Baum was ended and settled up; denied all fraud and combination; admitted that he had united Baum and Williams in the subsequent attempt to build up a town, and relied upon the lapse of time, the defaults, laches, and acquiescence of the complainant and the statutes of limitation, in bar of the claim set up in the bill. The respondent, moreover, admitted or explained a number of papers respecting *which he had been interrogated, and then prayed that his answer might be considered as a cross-bill.

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The answer of Williams admitted the formation of the Baum Company, the subsequent formation of the Port Lawrence Company; averred that in the spring of 1819, Embree, the partner of the respondent, whilst the respondent was absent in Illinois, purchased from Oliver an interest of one-thirteenth in the Baum Company; admitted the relinquishment to the United States of Nos. 1 and 2, which was made by the respondent himself; that the proceeds of the large number of tracts standing in the name of Baum, and thus relinquished, were ascertained in gross, and a credit entered to that amount on the lands retained; that the proceeds of tracts Nos. 1 and

2, were $4,817.55½, and the amount due to the United States, on tracts 3, 4, 86, 87, was $1,372.36, and upon the five quarter-sections $1,248; averred that he did not know what became of the balance of $474.60, except that John H. Piatt and Baum arranged it to their mutual satisfaction; denied that there was any agreement, understanding, or intention, amongst the members of the Port Lawrence Company, to re-purchase tracts 1 and 2; averred that after the relinquishment the members of the Port Lawrence Company abandoned Baum, and left him to settle the liabilities of the company as he could; denied all knowledge or belief that the complainant or Baum attended the public sales in 1827 with the intention of re-purchasing said tracts for the benefit of the company, but on the contrary intended to purchase them on account of other persons; denied all knowledge or belief that Oliver was authorized by Baum to open a negotiation with the trustees of the Michigan University; averred that in May, 1831, Oliver offered to sell to the respondent one-fourth of tracts 1 and 2, 86 and 87, except sixty acres of 86, for a specified sum, and at the same time offered another fourth each to Martin Baum and Jacob Burnet, which offer the respondent accepted, taking one-third instead of one-fourth, as Burnet declined becoming interested; and in 1832, the respondent purchased an additional sixth from Oliver, which purchases together gave him an interest of one-half, for which he received a deed in fee-simple from Oliver and wife; averred that at the time of paying the purchase money and receiving the deeds, he had no notice or knowledge of any right, title, claim, demand, or interest, of the complainant, or the Port Lawrence Company, or any of the members thereof, nor had he any notice, knowledge, information, suspicion, or belief, of any fraud, or breach of trust, or other transactions, matters or things, affecting the titles of said lands, but maintained that he purchased the same *bona fide*, in good faith, and for a full and fair consideration actually paid.

To all these answers a general replication was filed.

In December, 1840, the bill was taken as conferred by all the defendants who had failed to plead, demur, or answer, and the cause *came on for hearing upon the [*351 bills, answers, replications, testimony and exhibits, when the court passed the following decree:

"The court do here find that the law and equity of the case are with the complainant; but because the court here are not fully advised as to the exact nature and extent of the relief to which the complainant is entitled, so as to enable them to render up a final decree in the premises, it is therefore adjudged, ordered, and decreed, that this cause be, and the same is

hereby, referred to Aaron F. Perry, as special master commissioner, who is hereby instructed to make out, and report to us at our next term, an amount of the sales made in whole or in part of tracts one, two, three, four, eighty-six, eighty-seven, and the five quarter-sections, designating the date and amount of sales in each tract, title made, moneys received and due, and also an account of all moneys expended, either in the purchase or improvement of each tract, by the defendants Williams and Oliver, or either of them, including compensation for the agency exercised in the general management of the property, and such other matters of fact and calculations as either party may deem necessary, in order to a just and equitable decree in the premises; and for that purpose he is hereby invested with power to demand the production of any books, papers, and accounts in possession of either of the parties, to examine them, if necessary under oath, touching any particular matter or thing connected with the matters in contest, to examine and take the deposition of witnesses, to withdraw any exhibit or paper now on file with the clerk, giving a receipt therefor, and perform every act necessary to a proper adjustment of the accounts and transactions of the parties. He is hereby required to deliver to each party demanding the same. a copy of his report, twenty days previous to the next term of this court, until which time this cause is continued."

In addition to the points upon which the master was directed in the decree to report, the solicitor for the complainant stated twenty-five others, and the respondent fourteen, as matters of fact and calculation which they respectively deemed necessary.

On the 3d of July, 1841, the master presented a very voluminous report, occupying nearly five hundred pages of the printed record.

To this report the complainant filed twenty-one exceptions, and the defendants ten. They related chiefly to matters of detail and account, which it would be difficult to understand unless the whole report were here inserted.

In July, 1842, other parties were made in place of those who had died; and John Rowan, a citizen of Kentucky, filed his answer voluntarily, claiming an interest of six-thirteenths in the Baum Company.

At the same term the court referred the case to Edward D. Mansfield, master, to report the deduction of title as claimed by each of the parties.

*352] *On the 22d of July, 1842, the master, in conformity with the above reference, reported the deduction and then condition of the several titles.

At the same term, additional parties were made, to repre-

sent the dead, and the case was again referred to Mansfield, with the following instructions, viz.: "To state separate accounts of the compensation which, under all the circumstances, ought to be made to the said William Oliver and to the said Micajah T. Williams for their services; and also an account for expenses in the procurement, management, and improvement, in the value of the trust property, consisting of tracts 1, 2, 86, 87, and the ten acres in No. 3; and that the said master also restate separate accounts touching the moneys or other proceeds arising to said Oliver and Williams, from sales made prior to the filing of the bill, of any parts of said trust property; and also of the account of said Oliver against the Port Lawrence or Piatt Company, for advances not heretofore reimbursed.

In estimating services, expenses, &c., the master is to have reference to the advantage derived from said expenses and services, &c., as well to tracts Nos. 3 and 4, and the half-section No. 3, and south-west quarter-section No. 2, township 3, as to the tracts before named. And that in performing this order, the master, besides having reference to the papers, depositions, &c., now on file, may take further testimony, or further examine the parties if he deems it necessary.

On the 27th of July, 1842, the master filed a report, entering minutely into the several matters of account, to which four of the defendants took four exceptions.

On the 29th of July, fresh parties were made in the place of some more who had died, and the master made two additional reports, to which Oliver and Williams took twelve exceptions.

On the 30th of July, the court pronounced the following final decree:

"1st. That Philip Grandin and Hannah C. Grandin his wife, Mary P. Ewing, Egbert T. Smith and Sarah R. Smith his wife, Nathaniel G. Pendleton, William J. Van Horn and Margaret Van Horn his wife, John Spencer and Susan Spencer his wife, Samuel Perry, as administrator of Martin Baum, deceased, Jacob Burnet, the administrator of William C. Schenck, deceased, William J. Van Horn, as administrator of William Barr, deceased, having been duly served with process requiring them to appear and answer the complainant's bills, and they not having appeared, plead, demurred to, or answered the same, as required by the rules of this court, the said bills, and the matters therein contained, are hereby, as against them respectively, declared to be taken as confessed.

"2d. That the rights of the defendants, Isaac Dunn, the unknown heirs of William Steele, deceased, Alexander Find-

ley and Ann Ellen Findley his wife, Woodhull S. Schenck, Andrew Mack, Israel T. *Canby, and Gorham A. Worth, who are not inhabitants of the state of Ohio, or found within the district of Ohio and jurisdiction of this honorable court, if any they or either of them have, or hath, in and to the lands and premises in question, be, and the same are hereby, reserved to them respectively, in as full and ample a manner as if this decree had never been rendered.

"3d. That Eleanor Baum, Egbert T. Schenck, Elizabeth Schenck, James F. Schenck, jun., Susan Louisa Pendleton, Martha Pendleton, George Hunt Pendleton, Elliott Hunt Pendleton, Ann Pierce Pendleton, Nathaniel Pendleton, Mary Barr, William W. Barr, and David Barr, the infants, defendants, are hereby respectively allowed six months after attaining majority, to show cause, if any he, she, or they, hath or have against this decree.

"4th. And the court further decree, that all *bona fide* sales, interests, and undivided interests, in and to lots in the town of Toledo, in the ten acres of tract number three, and in the lots 86 and 87, made by the said Oliver and Williams, before the filing of the original bill in this case, together with the sixty acres sold by Martin Baum to Tromley and Prentiss in tract 86, be, and the same are hereby, ratified and confirmed; and as to any of said sales not yet perfected by conveyances, and as to which the outstanding claims upon the purchasers have been reported on, it is decreed that the same inure to the said Oliver and Williams, and they are empowered to receive the amounts due thereon to their own use, and to convey the land to the purchasers. And all donations, appropriations, and dedications of any parts of said several tracts of land for any public use heretofore made, be, and the same are hereby, confirmed to the original purpose of the donation, appropriation, or dedication. And inasmuch as Benjamin S. Brown, to whom, by the resolution of the proprietors, on the 17th September, 1837, the lots Nos. 109, 110, 111, were to be conveyed for the purpose of the appropriation of those lots, has departed this life, it is ordered, with the assent of the parties to this suit, in interest, that Richard Mott be, and he is hereby, appointed trustee, instead of said Brown, to carry out said appropriation. And the partition heretofore made between the said Oliver and Williams, and their assignees of interests, be, and the same is hereby, ratified and confirmed to the respective parties thereto, according to the original intent of the same; and it is further decreed, that the lease made by the said Williams to Garret D. Palmer, on the 24th November, 1840, be, and the same is hereby, confirmed; and the rents

accruing and to accrue on said lease, since the 1st day of July, 1842, inure to the benefit of the parties in interest, as settled by this decree.

"5th. That the said Oliver and Williams hold the legal title to the following tracts of land mentioned in the pleadings, not otherwise disposed of in this decree, that is to say: tracts 1 and 2, 86, 87, and ten acres of tract 3, in trust, for themselves and the other *members of the Port Lawrence Company, so-called, and those now holding and representing their interests, as tenants in common, in the proportions affixed to their names, that is to say, dividing the whole into 2832 parts, then the said trust is— [*354

For Alexander H. Ewing - - - - -	989	6-10 parts.
John Rowan - - - - - - - - -	496	6-10
Robert Piatt - - - - - - - -	219	5-10
John G. Worthington - - - - -	219	5-10
William Oliver - - - - - - -	165	5-10
Micajah T. Williams - - - - -	82	8-10
the heirs of William M. Worthington	219	5-10
the heirs of John H. Piatt - -	439	parts.

For the said heirs of J. H. Piatt, being Benjamin M. Piatt, Abraham S. Piatt, Hannah C. Grandin wife of Philip Grandin, each one-fouth part of the said 439 parts, and for the heirs of Francis Dunn the other fourth, viz.: John P. Dunn, Jacob P. Dunn, George Dunn, Strange S. Dunn, Hannah M. Tousey wife of George Tousey, Sarah Jane Layton wife of William Layton, each one-seventh of said fourth; and Francis E. Smith, and Adam C. Smith, each one-fourteenth of said fourth.

"6th. And the court do further order, adjudge and decree, that the said Oliver and Williams do, within five months from the date of this decree, by deeds, with special covenants, to be prepared by each of said parties for their respective interests, convey to each of said parties, in fee-simple, the undivided proportion of said trust-estate affixed to his or her name as aforesaid, together with the undivided interests in the same proportions in the wharves, ferries, &c., heretofore reserved for the use of the said Oliver and Williams in their former conveyances; and also the same proportions of all public edifices, materials, and advantages heretofore reserved to the said Oliver and Williams, saving to the said Oliver and Williams the hotel materials; and also, in the same proportions, the interests remaining in the said Oliver and Williams in and to the following common and other property, that is to say: lots numbered 109, 110, 111, 119, 120, 121, 162, and 163, in the town of Toledo, and any others in which there is any such

interest in said Oliver and Williams, they, the said Oliver and Williams, retaining in themselves only the proportions pertaining to them and ascertained as aforesaid. And it is further decreed, that the said Oliver and Williams permit the said parties respectively, to enter into the possession and enjoyment of their said portion of said estate as tenants in common. And it is further ordered and decreed, that the said Oliver and Williams, do, within the said sixty days, transfer to the said parties respectively, without recourse, in the same proportions, the demand on the books of said Oliver and Williams against Andrew Palmer, as agent, now amounting, according to the report of the master, to the sum of $5,568.79; and the like demand against
*355] Edward Bissell, now amounting, according to said report, to the sum *of $2,427.35; and also the like demand against Stephen B. Comstock, now amounting, according to said report, to the sum of $976.62; the said three sums being reported as due from the said Palmer, Bissell, and Comstock, of moneys which came to their hands as agents connected with the sale of lots and improvements in said town of Toledo.

"7th. It is further ordered and decreed, in respect of the moneys heretofore received by the said Oliver and Williams, or either of them, from sales, rents, or otherwise, arising from either of said tracts of land, which is not allowed to the said Oliver and Williams for compensation for their services, or for expenses on account of said trust property, that there remains in their hands, as said trustees, the sum of $2,237.35; which said sum is held by them in trust for themselves and the other parties, in the same proportions hereinbefore found and decreed as to the said trust lands; and apportioning the same according to said rule, the parties will be entitled to the following sums:

To said Alexander H. Ewing	$781 76
John Rowan	392 35
Robert Piatt	173 40
John G. Worthington	173 40
William Oliver	130 78
Micajah F. Williams	65 39
Alice Worthington, executrix and trustee of Wm. M. W.	173 40
heirs of John H. Piatt	346 80

"And of the share of the said John H. Piatt, the following are the portions of his heirs, that is to say,

To Benjamin M. Piatt	$86 70
Abraham S. Piatt	86 70

Hannah C. Grandin	86 70
John P. Dunn	12 33
Jacob P. Dunn	12 33
George Dunn	12 33
Strange S. Dunn	12 33
Hannah M. Tousey	12 33
Sarah Jane Layton	12 33
Francis E. Smith	6 16
Adam C. Smith	6 16

"And the court order and decree, that the said Oliver and Williams pay, within five months from the date of this decree, the said several sums, except those opposite their own names, with interest; and in default thereof, that execution issue therefor, as at law.

"8th. That the said William Oliver, having held the legal title to the south-east quarter of section 3, township 3, in the said reserve, as trustee, in trust for the complainant and the other members of the Piatt Company, on the 25th day of July, 1835, at the time he sold *and conveyed the same [*356
to William J. Daniels, for the sum of $1,000, whereby the said complainant and the other members of said company, their heirs or legal representatives, became, and are now entitled to their proportionate shares of the avails of said sale, with the interest which has accrued thereon, amounting, in the aggregate, to $1,420; that is to say, each are entitled to the proportionate shares of said avails annexed to their names respectively, viz:

The complainant, one-eighth part,	$177 50
Alexander H. Ewing, three-eighth parts,	532 50
John G. Worthington, one-eighth part,	177 50
Alice Worthington, as executrix and trustee of Wm. M. Worthington, dec'd, one-eighth part,	177 50
The heirs of J. H. Piatt, dec'd, two-eighth parts,	355 00

That is to say, of the share of the said John H. Piatt, his heirs are entitled as follows, to wit:

Benjamin M. Piatt the sum of	88 75
Abraham S. Piatt	88 75
Hannah C. Grandin,	88 75
John P. Dunn	12 68
Jacob P. Dunn	12 68
George Dunn	12 68
Strange S. Dunn	12 68
Hannah M. Tousey	12 68
Sarah Jane Layton	12 68
Francis E. Smith	6 84
Adam C. Smith	6 84

"It is therefore further decreed, that the said defendant, Oliver, do, within five months from this date, pay to the complainant and the heirs and legal representatives of the original proprietors of the Piatt Company the above sums, annexed to their respective names, with interest from this date, or that executions issue therefor as on judgments at law.

"9th. That Mary P. Ewing, in her own right, and the said Alexander H. Ewing, in right of his wife, the said Mary P. Ewing, being invested with the legal title to the north-west quarter of section 2, township 3, in said reserve, as trustee, in trust for the complainant and those now holding and representing their interest in the Piatt Company; that is to say, in trust for the persons, and in the proportions annexed to their respective names, as follows:

The complainant, one-eighth part, - -	20 acres.
Alexander H. Ewing, three-eighth parts, -	60
John G. Worthington, one-eighth part, -	20
Alice Worthington, executrix, and trustee of Wm. M. Worthington, dec'd, one-eighth part,	20
Heirs of John H. Piatt, dec'd, two-eighth parts, That is to say,	40
*257] Benjamin M. Piatt - - - - - -	10
Abraham S. Piatt - - - - - -	10
Hannah C. Grandin, wife of Philip Grandin, -	10
John P. Dunn - - - - - - - -	1⅛
Jacob P. Dunn - - - - - - - -	1⅛
George Dunn - - - - - - - -	1⅛
Strange S. Dunn - - - - - - - -	1⅛
Hannah M. Tousey, wife of George Tousey,	1⅛
Sarah Jane Layton, wife of Gm. Layton, -	1⅛
Francis E. Smith - - - - - - - -	⅛
Adam C. Smith - - - - - - - -	⅛

"It is therefore further decreed, that the said Alexander H. Ewing and Mary P. Ewing his wife, do, within sixty days from the date of this decree, by deed, with special covenants, (to be prepared by each of said parties for their respective interests,) convey to the said parties in fee-simple, except the said John G. Worthington, to whom a conveyance of his proportion has already been made, the undivided proportion of said trust-estate affixed to his or her name as aforesaid; they, the said Alexander H. Ewing and Mary P. Ewing, retaining in themselves the proportion pertaining to them as ascertained as aforesaid. And it is further decreed, that the said Alexander H. Ewing and Mary P. Ewing permit the said parties

respectively to enter into the possession and enjoyment of their said portions of said estate as tenants in common.

"10th. As to the account on file and reported upon by the master, for advances made by Martin Baum for the Port Lawrence Company, the court find that the amount of the same, with interest to this time, is $2063.96, which is chargeable upon the said trust estate; and the court further find that the said claim is now held by the defendant, Alexander H. Ewing, and should be apportioned to the several interests in said property, except the proportion of the said Oliver and Williams, which has been satisfied. The proportions of said demand remaining to be satisfied are as follows, to wit:

John Rowan to pay	$360 08
John H. Piatt's heirs to pay	320 38
Robert Piatt to pay	160 19
J. G. Worthington to pay	160 19
Wm. M. Worthington's heirs to pay	169 19
Alexander H. Ewing's share	721 29
William Oliver's share	120 36
M. T. Williams's share	60 18

"And thereupon the court further decree, that the said John Rowan, the heirs of John H. Piatt, according to their portions ascertained in this decree, Robert Piatt, John G. Worthington, the heirs of Wm. M. Worthington, shall each pay the proportion of said account affixed to their names, with accruing interest, within five months, or in default, that execution issue against each for his or her proportion.

[*358 *"11th. As to the claim set up by Robert C. Schenck's answer to lot No. 1 in the original plat of Port Lawrence, which was sold to William C. Schenck, and for which Martin Baum, trustee, in his lifetime issued a certificate to Egbert T. Smith, who afterwards assigned the same to the said Robert C. Schenck, who now holds it in his own right, the bill is dismissed, without any prejudice to his, the said Schenck's right, and he has leave to withdraw from the files of this court his answer and other papers relating thereto.

"12th. As to the costs in this suit, it is ordered, that the costs of this suit be paid by the defendants, according to their several interests ascertained by this decree, within four months, into the hands of the clerk, one docket-fee only to be taxed, and that to the complainant; and in default of payment, execution may issue as by law. And the court allow to Master Perry the sum of $618 for his services and expenses, to be taxed in the costs—of which there has been paid to him $50 by the defendant, A. H. Ewing, and $50 by the said Robert Piatt; the balance of the allowance only to be paid said Perry,

and the said Ewing and Piatt to be credited with their said advances. And the court allow to the Master Mansfield, to be taxed, the sum of $75, for his services in this case."

From this decree an appeal brought the case up to this court.

Stanberry and *Ewing*, for the appellant.
Pirtle and *Scott*, for the appellees.

The printed briefs in the case occupied nearly one hundred pages. It is difficult to give a condensed statement of the arguments of the counsel, because many of them were founded upon matters of evidence, which it was impossible to embrace in the foregoing statement of the case.

Stanberry divided his argument into the following heads, under each of which he referred to various portions of the record.

1. The formation of Port Lawrence Company.

After narrating its history, he said:

The Port Lawrence Company was strictly an association of companies, rather than of individuals; each of its constituent companies continued its separate existence, and held separate estate; the union only extended to the property held in common; the eleven members of the new company entered into no new arrangement, changing the quantum of interest of the members of its constituent companies. All that was settled, in that respect, was, that each company should contribute one half to capital and expenses, and own one half of the stock, leaving each company to adjust the interests of its respective members in its moiety of the concern.

In every sense, this was a partnership, not simply a tenantcy in common. The capital was real estate, not acquired for *859] division among the owners, but for speculation. It was to be laid out in a *city, requiring further advances from the partners in the way of expenditures, and to be sold, in parcels, for the common profit.

The Baum Company, in their articles, call themselves a partnership.

See letter of instructions of Piatt Company, in which they say their object is to buy for sale and profit, for their common benefit.

The modern authorities are full to the point, that, in the estimation of a court of equity, real estate, held as partnership assets, is considered as personal estate.

Mr. Justice Story, in his Commentaries on Equity, vol. 1,

page 624, in treating of partnership property, says: "A court of equity considers the real estate, to all intents and purposes, as personal estate, and subjects it to all the equitable rights and liens of the partners which would apply to it if it were personal estate. And this doctrine not only prevails as between the partners themselves and their creditors, but (as it should seem) between the representatives of the partners also. So that real estate, held in fee for the partnership, and as a part of its funds, will, upon the death of one partner, belong, in equity, not to the heirs at law, but to the personal representatives," &c.

Mr. *Stanberry* then quoted Collyer on Partnership, 76, and 7 Con. Eng. Ch., 215; 5 Id., 383; 8 Ohio, 364.

2. Operations and state of the Port Lawrence Company, from its organization until September, 1821.

The history of the company was traced from year to year.

3. General allegation of fraud, and the transactions subsequent to relinquishment.

We have, first, the general allegation of fraudulent combination between Baum, Oliver, and Williams, to cheat the Piatt Company out of their five quarter-sections, and their moiety of the Port Lawrence Company lands. The rules of pleading in equity do not admit this general allegation of fraud, but require the facts which constitute it to be averred, that issue may be taken on them. In answer to such general allegation, a general denial is sufficient. *White* v. *Hall*, 12 Ves., 323.

The time of this combination is laid in the early part of the year 1822. The allegation is first made in 1836, years after the death of Baum. It therefore affects the dead as well as the living. It is, besides, an allegation of breach of trust, as well as fraud. The sort of proof which is required to make out such a case, is well stated by Mr. Justice Story, in *Prevost* v. *Gratz*, 6 Wheat., 498:

"Fraud or breach of trust ought not lightly to be imputed to the living, for the legal presumption is the other way; and as to the dead, who are not here to answer for themselves, it would be the height of injustice and cruelty to disturb their ashes, and violate the sanctity of the grave, unless the evidence of fraud be clear beyond a reasonable doubt."

*Baum lived many years after this transaction, and during his life it was not questioned. He is not here [*360 to answer for himself, and those who represent him, and have had the custody of his papers, make common cause with the complainant. (See A. H. Ewing's answer, p. 81, and his deposition, p. 361.)

It is very proper in such a case, where fraud and breach of trust are imputed to the dead, and attempted to be raised upon presumptions from conduct, to look to the character of the deceased.

The whole case shows that Baum was esteemed by all parties a man of the strictest honor, and had the fullest confidence of his associates.

4. Oliver's agency.

The bill alleges that, on the 14th August, 1817, Baum, with the advice and consent of the company, appointed Oliver agent to lay out the town, (with Schenck's assistance,) and to attend to the concerns of the company; which agency Oliver accepted, and has continued such agent ever since.

Oliver answers that he was appointed agent August 14, 1817; that his appointment was for one year; that about the month of May, 1818, he was elected cashier of the Miami Exporting Company, a bank at Cincinnati; that he entered upon his duties of cashier about the 1st of July, 1818, and considering these duties incompatible with his Port Lawrence agency, before entering on his duties as cashier, he resigned his agency to Baum, settled his accounts, and delivered to Baum all moneys and papers relating thereto.

On the 14th August, 1818, Oliver sold half his interest in Port Lawrence Company to Steele and Lytle, they assuming all liabilities; and in March, 1819, he sold, in like manner, the other half to Embree and Williams.

The allegation of the continuing agency of Oliver is met by the direct denial of the answers, which allege that, as originally constituted, it was to continue but one year, and actually terminated in less than a year, on the 4th July, 1818.

Next, and what is much more satisfactory, we have the express limitation of the agency to the period of one year, and the salary of $1,200, in the letter of Baum to Oliver, of August 14, 1817; the testimony of Gano, that Oliver's whole time from July, 1818, for the succeeding four years, was directed to his duties as cashier; the allowance of the salary down to July 4, 1818, and no longer; the total absence of evidence of any renewal of the appointment of agent, or the payment of any salary after that date, and the special power given by Baum to Oliver, on the 1st September, 1825, to collect money due to Baum on the Port Lawrence concern.

It well appears, therefore, that Oliver's relation to Port Lawrence Company, as agent, ceased on the 4th July, 1818, and that his relation as partner ceased in the month of March, 1819, when he sold his remaining interest, without recourse, to Embree and Williams. *From that time

*861]

his only relation to this company was as a purchaser of lots in Port Lawrence.

But if his relation as agent continued, there was nothing in that to prevent his purchase of the lands of the company, in payment or collection of a *bona fide* debt

5. The certificate of $213.07.

The bill alleges that this was a false certificate, purporting to have been given to Oliver by Baum, for moneys refunded by Oliver to purchasers of lots in Port Lawrence; that the transactions in respect to it were secret; that instead of making personal demand of the plaintiff and other members of the Piatt Company, Oliver fraudulently attached three of their five quarter-sections, and purchased them under that proceeding.

(Mr. *Stanberry* here referred to many parts of the record, to show that the debt was just; that personal demands were made for payment from the plaintiff and other members of the Piatt Company; and that the transaction was not a secret one.)

Three objections are taken in the bill to the proceedings in attachment under this certificate of debt.

1st. That Michigan had no jurisdiction.

2d. That certificate was not a valid claim.

3d. That the proceedings were fraudulent.

The court below decided against their validity, upon another ground, viz., that the estate of the parties to the attachment could not be reached by that process.

See the Michigan statute as to attachments, which embraces all "rights, credits, moneys and effects, goods and chattels, lands and tenements." Laws of Michigan Territory, Chap. 28, No. 189, Cong. Law Lib., 399.

Baum was a party, and he held the final certificate showing full payment. The debt was still due, primarily from him, as the acting partner, and was raised by advances at his request, in discharge of his personal covenants. The land attached was a fund he held as indemnity against those advances. He certainly had an estate, a right. Subordinate to his estate or lien on these lands, the members of Piatt Company had a right in these lands; they were entitled to them after the debts were discharged; their interest was simply an equity of redemption.

It seems to us a startling doctrine, upon a bill filed in another jurisdiction, collaterally, to hold these attachment proceedings a nullity. The court of Michigan had exclusive jurisdiction of the territory in which these lands were situate. That was decided in the Circuit Court. The court in Michigan specially ordered a sale of these lands, (210,) and now it is claimed that the whole proceeding is void, not simply voida-

ble on writ of error, but absolutely null; and this, too, by a court of another jurisdiction, in a collateral proceeding.

*362] *The proceeding differs wholly from the ordinary sale of lands on execution, in which the judgment of the court is one thing, and the proceeding by execution quite another, and carried on by the party.

This is a proceeding *in rem*, in which the court acts upon the thing, and takes, specially, jurisdiction of it.

We think the authorities cited in the Circuit Court do not sustain this doctrine.

Cases relied on in Circuit Court. *Piatt et al.* v. *Law et al.*, 9 Cranch, 496.

The questions of the validity of the sale of an equity of redemption in lands, under the attachment law of Maryland, was raised; and it appeared that question had not been decided by the Supreme Court of Maryland. The statute of Maryland, of 1715, chap. 40, makes "goods and chattels, credits, &c.," liable to attachment. The statute of 1795, chap. 56, in "lands, tenements, goods, chattels, and credits."

This court, in the above case, held that the decree of the court of Maryland, if it did not fix the law as to the attachment, at least, fixed the fate of the lands attached beyond reversal, p. 496.

One judge doubted if the attachment act, making the equitable interest tangible, did also make it subject to execution. The court was of opinion that the condemnation gave the court power to issue final process of execution, p. 496.

Haven v. *Law*, 2 N. H., 13, was a case of pledge of personalty; and it was held that the interest of the owner could not be seized in attachment. The court say such an interest is made liable in some of the states by statute.

It appears from the case of *Kitteridge* v. *Bellows*, 7 N. H., 899, that an equity of redemption in lands is subject to attachment, even in that state.

Badlam v. *Tucker*, 1 Pick. (Mass.), 399. The court say it is only by statute that equities or rights to redeem are subject to attachment by ordinary process, and no statute, in Massachusetts, has authorized the attachment of such interest in personal property.

See Revised Statutes of Massachusetts of 1836, chap. 90, sect. 23 and 24. The attachment in that state is ordinary mesne process, and execution upon it by statute provision only goes against such interests as are subject to execution at law

Jackson ex dem. Ireland v. *Hull*, 20 Johns. (N. Y.), 81, cited

by Circuit Court to show that an equity of redemption cannot be attached.

It was a sale under judgment and execution of the equity of redemption of mortgagor. Held that the equity of redemption did pass by the sale; and it appearing the sale did not satisfy the judgment, (which was on the mortgage debt,) it was held that the purchaser *took, subject to the remainder due on the judgment. See *Waters et al.* v. *Stewart*, 1 Cai. (N. Y.), Cas., 67, to same point. [*363

6. The mortgage.

On the 27th August, 1823, Baum, for the consideration of $1,835.47, conveys to Oliver, in fee, tracts 3, 4, 86 and 87, except sixty acres off upper end of 86, sold to Tromley and Prentiss. Baum covenants that he is the true owner, and hath full power to sell, and with general warranty. The condition is, that upon payment of $1,835.47, "the sum due Oliver from Baum and his associates, in the purchase of said property," on or before the 1st January, 1824, with interest from September 1, 1823, the mortgage to be void.

The bill alleges that this mortgage was a fraudulent, secret contrivance to cheat the owners out of their property.

That the pretence that there was $1,835.47 due to Oliver was false.

That Baum had no power to sell, mortgage, or in any manner to convey any lands, except 1 and 2.

(Mr. *Stanberry* here examined the record and contended that there was nothing fraudulent or secret about it; that the debt was justly due, and that Baum had full power to sell or mortgage. With regard to Baum's powers, he said:)

It is, then, not disputed that there was no written appointment, power of attorney, or declaration of the powers or trust vested in Baum. He was made the agent or trustee for the six tracts—all the lands of Port Lawrence Company. At the time of his appointment, the certificates of title stood in the names of the agents who made the purchase at Wooster. It is admitted, by the amended bill, that it was then agreed that all the certificates should be assigned to him; but it is alleged in the same bill that the assignments were made just prior to the relinquishment in 1821. The answers are express, that all the tracts were assigned in 1817, and the subsequent and more formal assignments were made necessary on the relinquishment.

The nature of the business required that the title should be vested in Baum—

1st. To prevent difficulties from deaths in a company of

eleven members, thereby embarrassing the transfer of title to a multitude of purchasers.

2d. Baum sold with his personal covenants to make title, which necessarily implied that the title was in him.

He had power to sell all the lands, on speculation, or for the debts of the company.

The bill alleges that no power of sale or mortgage was given as to any other lands than 1 and 2.

*364] *The answers are responsive, and expressly allege the contrary; and there is nothing contradictory in the proof.

We have so far considered Baum's powers as originally granted; but at the date of the mortgage they stand on different ground.

A power originally conferred, even by writing, may be enlarged subsequently, and this enlargement be proved by parol. Story Eq., 97.

It is admitted that the title to the unrelinquished lands was formally transferred to Baum in September, 1821.

The bill alleges that this transfer was for the sole purpose of the relinquishment and appropriation to the unrelinquished lands.

This allegation is denied by the answers, and no proof to contradict.

The complainant introduces Baum's letters to Brown of 1822 and 1823, which state that all the lands were transferred to him for convenience of sale and conveyance.

Clothing a person with apparent ownership and right to sell, implies that the apparent is the real authority. Story on Agency, 108.

Now had Baum power to mortgage for the debts of the company?

1st. On bill and answer that power must be taken to have been expressly given in the beginning, and consequently existed in August, 1823, the date of the mortgage.

2d. But it is necessarily implied, at that time, the title was in him, without limitation. He had incurred liabilities for the company, and there was no other fund provided for the debts but these lands. He might even sell them—for a power to raise money out of an estate authorizes a sale. 1 Atk., 421.

3d. It is further implied by acquiescence. Story on Agency, 60. In January, 1823, Baum sells thirty acres to Prentiss and thirty acres to Tromley, of which the company are notified by the circular of 1824, and to which no objection is made.

So, too, the acquiescence in this mortgage, notified to the company by the same circular.

4th. But the powers of Baum are greatly enlarged when we

regard his true character—not an agent, but the managing partner of a partnership in real estate—the "*præpositus negotiis societatis*"—holding all the title—managing all the business—incurring, by his personal covenants, the primary liabilities.

5th. Besides this power of disposal over the assets, as managing partner, he stands in another relation to these lands after his advances.

At the time of the mortgage, his debt against the partnership, for advances and liabilities, amounted to $4,755.25. Wyllis Trust., 164; *Lambert* v. *Bainton*, 1 Ch. Cas., 199; *Dove* v. *Langston*, Plowd., 186, (at top); *Chalmer* v. *Bradley*, 1 Jac. & W., 51.

*These cases are to the point, that a trustee, to sell, becomes in effect the owner, by advancing to the value. [*365

There may be a question, whether this doctrine applies, in its full force, to realty as well as personalty. *Lambert* v. *Bainton* was real estate, and the lord keeper there held the doctrine.

In *Chalmer* v. *Bradley*, which was also a case of real estate, the Master of the Rolls says he is aware of a distinction between personal and real estate; nevertheless, he seems disposed to act upon the analogy.

We maintain that the doctrine applies, in all its force, to the case at bar, for the shares in this real estate partnership, carefully separated as they were from the title, and cognisable only in equity, are uniformly treated in this court as personalty.

Baum, then, might have held this land as his own. He might have sold it; instead of which he mortgages it, and with great regard for the interests of his delinquent associates.

Several objections are taken to the proceedings by which the mortgage was foreclosed: First, that they were carried on secretly. The bill alleges that the plaintiff had no knowledge of the mortgage or the proceedings until after Oliver had obtained the patents, (which was in December, 1830,) except only through Baum's circular of January, 1824.

Oliver answers, that when the debt secured by the mortgage became due, he applied to the different members of the company, and especially to the plaintiff, for payment, but in vain. That during the pendency of proceedings under the mortgage, the members of the company were cognisant thereof; that he advised the plaintiff of the proceedings, and urged him to pay the debt, or his proportion of it, to prevent the necessity of a sale, but the plaintiff paid no attention to the request.

There is not a particle of proof of the alleged secrecy, nor do these proceedings show any anxious haste to acquire this property, but quite the contrary.

Oliver submits to a postponement of payment of four months. He delays the commencement of legal proceedings for upwards of two years, and delays a sale for five years; in the mean time endeavoring in vain to get his money from his debtors.

The next objection to these proceedings, and the one on which most reliance was placed by the Circuit Court, is the want of parties. It is said the different members of the Port Lawrence Company, or those representing their interests, ought to have been made parties. We maintain this objection would not have been fatal if made by demurrer, or at the hearing in the court in Michigan. The title was in Baum alone. He fully represented all the members of the company. Even if he stood in the mere relation of a trustee, it is doubtful if this objection would have prevailed. *Campbell* v. **Watson*, 8 Ohio, 498; 11 Ves., 443; 8 P. Wms., 92; Story Eq. Pl., 145.

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But his true standing was that of acting partner, with the title to all the assets. The other members of the company were dormant partners, and by the rules of chancery practice need not to have been made parties defendant. *Lloyd* v. *Archbowle*, 2 Taunt., 324; *Ex parte Norfolk*, 19 Ves., 455.

But if Oliver acquired no title to the three quarter-sections by the attachment, nor to the other tracts by the chancery proceedings under the mortgage, yet he did acquire the legal title to all these lands, by the subsequent assignment of the certificates to him by Baum, and the granting of the patents.

7. Assignment of final certificates by Baum to Oliver.

In December, 1828, Baum assigned to Oliver the final certificates for tracts 8 and 4, and the three quarter-sections, purchased under the attachment; and in December, 1829, the final certificates for tracts 86 and 87; and in August, 1830, the final certificate for another of the quarter-sections. Under which assignments, Oliver obtained patents in December, 1830, for all but tracts 86 and 87.

(Mr. *Stanberry* here examined the charge that this assignment was fraudulent.)

In the opinion of the court below, it seems to be intimated that Baum's whole power of sale and transfer was exhausted by the mortgage. However that may be in the execution of strict specified powers, it is supposed the doctrine does not apply to the case at bar. Here the title was in Baum, without any express limitation or declaration of trust. It was not a power carried out from the estate, but the whole estate was vested. Doug., 292, 298, *Perkins* v. *Walker*, 1 Vern., 97; that a mortgage is not an exhaustion of a power of sale.

Besides, the transfer was not the exercise of any new power, but the confirmation of the first act; the ratification of Oliver's title under the mortgage, after his purchase at a judicial sale. Baum might have made an absolute sale to Oliver in the first place, instead of which he mortgages the land, obtains further time, and puts Oliver to the necessity of a purchase under judicial proceedings, at a public sale, open to competition. He then makes the transfer of the certificates; a very proper act, and such an one as a court of equity would have compelled him to do; such an act, therefore, as in conscience he was bound to perform.

Here, as well as in every part of this case, in which a question is raised as to Baum's powers, his true situation must not be forgotten. He was not merely an agent or trustee, but a joint owner, and the acting partner; invested with the title to all the assets, having made advances, and incurred personal liabilities, to their full value.

Under these proceedings and transfers, Oliver acquired the legal *title to the four quarter-sections, and [*867 the lands included in the mortgage, by patents issued to him in December, 1830. The plaintiff comes to be relieved, and to impeach the transactions under which that title was obtained. From first to last he has been under no disability. He pretends to have been ignorant of these transactions, but his full and current knowledge of them is established by the answers. In fact he admits notice upon the emanation of the patents.

Now if there was good faith in these transactions, it is out of the question to ask this court to disturb a legal title upon any of the grounds of irregularity or want of power, which are alleged. This is especially so when the laches of the plaintiff is taken into the account.

The case of *Bergen* v. *Bennett*, 1 Cai. (N. Y.), 1, is very much in point here. That was the case of a purchase by a trustee; a mortgagee with power to sell; sixteen years afterwards the mortgagor brought his bill to redeem. Kent, Justice, whilst he acknowledges the incapacity of the trustee to purchase, holds the title good, simply by the acquiescence. He states the distinction between the case of a bill brought against the trustee to set aside his legal title, and a bill brought by him to complete his purchase, and that equity would not interfere, as of course in the former case. He says, "the *cestui que trust* must come in a reasonable time to set aside the sale, or he will not be heard; and that what shall be termed a reasonable time, is not susceptible of a definite rule, but must in a degree depend upon the circumstances of the particular case,

and be guided by the sound discretion of the court. In this case the *cestui que trust* comes after sixteen years, finding it a gaining bargain, and being all that time under no disability." The learned judge then goes on to enumerate several cases of much shorter acquiescence, which were held barred.

Gregory v. *Gregory*, 1 Coop. Ch. Cas., 201, was a purchase by a trustee from *cestui que trust*, at an undervalue. The Master of the Rolls said he would have set it aside if the application had been made in a reasonable time, but a delay of eighteen years was too great.

Chalmer v. *Bradley*, 1 Jac. & W., 51, is to the same point, as to the effect of acquiescence in a breach of trust.

But this being a partnership, requiring regular contributions to meet liabilities, refusal or neglect to contribute works a forfeiture, and implies acquiescence, under circumstances less strong than in ordinary cases.

Prendergast v. *Tuston*, Younge & Coll. Ch., 98, decided in the English chancery in 1841, was the case of a mining partnership, in which a delay of nine years to meet contributions was held fatal to the plaintiff.

*368] The bill alleges that the plaintiff was always willing to contribute *his proportion, but was never called upon. The answers deny this allegation, and set out repeated and earnest requests, and total disregard of them.

How then stands the case of the plaintiff? He had engaged in a partnership adventure in real estate; debts were contracted by the acting partner, who was primarily liable upon his personal covenants. That acting partner is also deeply harassed with his own individual liabilities. The plaintiff is under no disability, is a man of property, is fully advised of the condition of affairs, and deliberately, for a series of years, abandons the property and the acting partner. In process of time, after the property has changed hands and greatly appreciated by the labor of others, he comes into a court of equity for relief. Is it not clear that but for this unexpected increase in value, we should never have heard of this case?

8. Exchange with the Michigan University.

If the court should be against the appellants on all the foregoing points, and be of opinion that Oliver held tracts 3, 4, 86, and 87 for the Port Lawrence Company, and the quarter-sections in trust for the Piatt Company, we claim next, that the decree was erroneous in giving to these *cestuis* tracts 1 and 2, instead of making the value of the lands exchanged a charge on 1 and 2.

These tracts, several years after the relinquishment, had been granted by Congress to the University of Michigan, and

were acquired from the trustees by Oliver, in exchange for tracts 3, (except ten acres in north-east corner,) 4, and the three quarter-sections purchased under the attachment. The journal of the trustees is exhibited to show the negotiation.

This part of the decree is attempted to be sustained on two grounds: that Oliver made the exchange as agent for the Port Lawrence Company, in conformity with an understanding formed at the time of the relinquishment to re-purchase these tracts: or if not, that as they were acquired with the lands of the Port Lawrence and Piatt Companies, a trust results for their use.

First, as to the alleged intention to re-purchase, and the exchange by Oliver in conformity to it.

The original and amended bills both allege that at the time of the relinquishment of 1 and 2, it was understood and agreed by the parties, that when at any time they should be offered for sale by the United States, they should be re-purchased for the benefit of all concerned.

The answer of Oliver expressly denies such understanding or intention, and states that he (Oliver) often conversed with members of the company on the subject of the relinquishment.

The answer of Williams is, that he was a member of the Port Lawrence Company at the time of the relinquishment, intimately acquainted with all its concerns and the views of its members, and never heard of such intention, then or afterwards.

*(Mr. *Stanberry* here examined the evidence touching [*369 this point.)

It is therefore quite clear, that there was no agreement on the part of the company to re-purchase tracts 1 and 2; that the subsequent acts and declarations of Baum were upon his own motion, and the motive was to secure himself first, and his associates ultimately, from loss. If he had then succeeded in the re-acquisition, his old associates might have had the election to come in or not, for they gave him no authority to bind them to new speculations.

However it might have been at the time of the memorial, yet in 1828, when the negotiation for the exchange was begun with the university, the idea of re-purchase for the old Port Lawrence Company is absurd, for at that date a majority of its members were dead or gone to distant parts, and the remainder had for seven years abandoned the concern.

There was then no agreement to bind the consciences of Oliver or Baum, and nothing in their relations of trustee or agent, if those relations continued, to disable them from acquiring these lands upon their own account.

When 1 and 2 were relinquished, the subject-matter of the trust and agency in regard to those tracts was ended. There was no pre-emption right in the company—no tenant right of renewal—no advantage obtained by reason of the trust.

"If, from being in possession, trustees have an opportunity of renewing the leasehold, such renewal can only be for their *cestuis que trust*; but where the old lease and all the trusts respecting it are determined, and there is no tenant right of renewal, the former trustee is *quoad hoc* trustee no longer. The fiduciary relation ceases for want of an object, and there is no ground for excluding the *quondam* trustee from being a purchaser." Hov. on Frauds, 481, 482.

So, during the continuance of a lease, the trustee may purchase the reversion in fee, though by this means he debars the *cestui que trust* of a chance of renewal. Id., 482.

Next, as to the claim that a trust results in 1 and 2 for the owners of the tracts which Oliver gave for them in the exchange.

The first objection to this claim is founded on its multifariousness. Here is trust property belonging exclusively to the Piatt Company, and other trust property belonging exclusively to the Port Lawrence Company, all of which has been applied by Oliver in the purchase of tracts 1 and 2, and which trust property was afterwards reclaimed by Oliver. This bill seeks relief for these independent *cestuis que trust* by demanding for each company its share in 1 and 2, and also its original fund afterwards regained by Oliver.

This makes such a case of multifariousness as would compel the court *sua sponte*, at the hearing, to refuse relief. 1 Story Eq. Pl., 224, n. 2; 10 Ohio, 459; *Campbell* v. *McKay*, 1 Mylne & C., 603.

There are other insuperable objections to this resulting trust in 1 and 2. *It was formerly doubted whether
*370] trust moneys could be followed into land, so as to operate even as a lien, in exclusion of other creditors. It is now settled that the lands may be charged with the trust fund, and that is ordinarily the sort of relief given to the *cestui*. Hov. on Frauds, 468, 471; *Wallace* v. *Duffield*, 2 Serg. & R. (Pa.), 521.

In some cases a trust in the land so purchased results to the *cestui*, but the case at bar is not of that class, because,

1st. Where in the misappropriation of a trust fund it has been confused with any other fund, the uniform rule is, simply to make the trust fund a charge on the new acquisition. *Crop* v. *Norton*, 2 Atk., 75. The only limitation upon the

doctrine as established by Lord Hardwicke in *Crop* v. *Norton*, that a trust never results, except where all the money is paid by one person, is, that where the joint advance is in conformity with an agreement of purchase a trust will result. *Wray* v. *Steele*, 2 Ves. & B., 388; *Bottsford* v. *Burr*, 2 Johns. (N. Y.), Ch. 410.

2d. Another objection to a resulting trust in tracts 1 and 2 is, that they were acquired in part by the individual funds of Oliver.

Under the mortgage proceedings and the subsequent assignment of the certificates, Oliver acquired, at the least, the interest of Baum in tracts 3 and 4, which tracts formed a part of the consideration for tracts 1 and 2.

Where land is purchased partly with trust and partly with individual funds, the trust fund so applied is simply a charge on the land, and affects the title no further. Willis on Trustees, 64; 1 Hov. on Frauds, 471, 472; *Lewis* v. *Maddocks*, 8 Ves., 159; s. c. 17 Id., 47.

3d. Oliver was not a strict trustee. He did not stand towards his *cestuis* in any one of the common fiduciary relations. He believed himself to be the sole owner of the fund with which he purchased 1 and 2.

Where land is purchased with a trust fund, but the party is not in a strict fiduciary relation, and acts under a belief of his right to the fund, the rule in equity is, to make the trust fund or its value a charge simply. *Savage* v. *Carroll*, 1 Ball & B., 265; *Perry* v. *Philips*, 4 Ves., 108; *Cox* v. *Paxton*, 17 Id., 329.

4th. Oliver has re-acquired the very lands, the identical trust fund which he is said to have misappropriated in the exchange for 1 and 2. There is therefore no necessity for following the original fund into the new acquisition, either in the way of charge or resulting trust, for the original fund is here undiminished, and by giving it them the *cestuis* are in *statu quo*.

5th. Another objection to giving the *cestuis* 1 and 2, is the difficulty of apportioning their respective interests in the new acquisition.

We know that the parties to the exchange considered 1 and 2 as equal in value to 3, 4, and the three-quarter sections, but what relative *value they affixed to 3, 4, [*371
and the three-quarter sections, we do not know. Undoubtedly they had their own views of this relative value, and these views may have been very dissimilar. How can the court fix that relative value, and say what proportion in the new acquisition represents the distinct funds vested in it? In the ordi-

nary case of a sale of lands, where the agreement settles all terms but the price, a court of chancery has never yet attempted to fix a price for the parties by the opinion of third persons. Even where the contract provides that the price shall be fixed by arbitration, a court of chancery will not compel the delinquent party to choose his arbitrator or even appoint arbitrators for them.

6th. The vast increase in the value of 1 and 2 since the purchase by Oliver, an increase brought about, in a great measure, by the combined efforts of Oliver and Williams, forbids a resulting trust.

This property, at the time of its purchase, was worth only about $5000. At the time of the filing of the bill it had advanced one hundred fold in value, mainly by the constant exertions of the appellants.

But if a trust did result, we claim that the decree is very far from establishing the true proportions of the parties in 1 and 2.

As to tracts 3, 4, 86 and 87, notwithstanding the proceedings in chancery, and the assignments of the certificates to be holden invalid, Oliver yet had title to them; his mortgage remained; by that he had the equitable estate. He subsequently obtained the legal title, in trust for all persons interested in the property. He sells the property for cash, and the *cestuis que trust* may affirm or disaffirm the sale. If they affirm it, how will equity compel him to apply the purchase money?

1st. To the expenses of the sale. 2d. To satisfy the mortgage in full. 3d. The residue to the mortgagors.

But if, instead of making this application, he lay out the money in other land, and if the court find they can pursue the money into the land, not merely as a charge upon it, but to raise a resulting trust in the land itself, then the land will be applied just as the money which bought it would have been applied, and in the same proportions.

If the mortgaged premises were exchanged for land, without the intermediate sale and re-investment, the same consequences would follow.

If it be found that Oliver should share, in equal proportion with the other persons interested, the profits of the bargain he has made, then we take the value of the property sold as the basis of our estimate, and it gives this result:

Lots 3, 4, 86, and 87, estimated by Hunt & Conant,	$2357 50
Mortgage, (deducting all corrections claimed,) with interest to 1830, - - - - - - - -	2218 00
Interest of P. L. Company, - - - - - -	$139 50

*If the court should be of opinion that equity ought not to give Oliver, the mortgagee, any share in the profits of his own bargain, nor any compensation for time, trouble, and expenses in making it, then the proportions would be settled thus:

Value of 1 and 2 in 1830, (Hunt & Conant,) -	$4030 00
Paid by Piatt Company, or Oliver, as the court shall find in another branch of the case, by the three quarter-sections, worth at same time, (Hunt & Conant,)	1120 00
	3010 00
Oliver's interest in the mortgaged premises, -	2218 00
Interest of Port Lawrence Company, - - -	$792 00

Oliver's expenses, services, &c., if allowed, would, of course, be deducted ratably from the respective interests.

9. We claim, if a trust is established in 1 and 2, that it was erroneous to allow the share conveyed by Burnett to Mary P. Ewing to be set up against Oliver, being $\frac{1}{8}$ of Baum Company's shares.

Baum conveyed the lands included in the mortgage to Oliver, with covenants of warranty.

Assets descended, upon the death of Baum, to his heirs. With part of the assets so descended, *i. e.* the amount due to Baum from the members of the Port Lawrence Company, for advances, Mary P. Ewing, one of his children and heirs, requires from Burnett title to an interest in the lands covered by the warranty of her father. The decree defeats the title to these lands, and allows the heir to recover upon the footing of the adverse interest so acquired.

We maintain she is estopped. Co. Litt., 325.

10. We claim, lastly, that the decree is erroneous as against Williams, who well maintains the ground of a *bona fide* purchaser, without notice.

The bill alleges notice, by Williams, of all the fraudulent combinations and transactions imputed to Baum and Oliver.

These allegations are met with full and unequivocal denials in the answer, which sets forth all the particulars required for the defence of a purchaser without notice.

There is not a particle of proof to impeach this answer, or to show that Williams had any knowledge of the fraudulent acts attempted to be made out against Oliver and Baum. He purchased an interest in the Port Lawrence Company in March, 1819. He was the agent to make the relinquishment of 1 and 2 in September, 1821, and does not appear again in the case until May, 1831, when he makes his first purchase from

Oliver. He finds Oliver invested with the legal title to 1 and 2, which had been relinquished ten years before.

It is said Williams was one of the *cestuis* whose property *373] was wrongfully conveyed by their trustee, Baum; that he must be presumed *to have knowledge that Baum had no authority to sell or mortgage the property.

In the first place, we do not see, if this be so, how it affects his title to tracts 1 and 2. The trust, as to them, ceased at the relinquishment. Ten years after, he finds Oliver invested with the legal title, and then purchases from him.

Will it be said that the recitals in the patent to Oliver for tracts 1 and 2 affect him with notice?

The patent issued to Oliver on the 4th March, 1831, and recites, that, under the provisions of the act of Congress of January 13, 1830, "to authorize the exchange of certain lots of land between the University and Martin Baum and others," the University had transferred 1 and 2 to Oliver, as the assignee of Baum.

In point of fact, Oliver was not the assignee of Baum, of tracts 1 and 2. No one pretends that this recital is not a mistake; nor can it be said the recitals in the act of Congress notified Williams that the phrase "Martin Baum and others" meant Martin Baum and the other members of the Old Port Lawrence Company. The most conclusive argument to show it implies no such notice, is found in the testimony of Judge Burnett, who, like Williams, was a member of that company, and, being in the Senate of the United States, voted for the law, and had no idea that "Martin Baum and others" included the company.

As to the other tracts, Oliver held the patents without any recitals. Williams knew a part of them had once belonged to the Port Lawrence Company, but he knew nothing to impeach Oliver's title.

Pirtle, for appellees, denied that this was a case of partnership, and commented on the authorities referred to by Mr. *Stanberry*, which, he contended, did not justify the position. He then traced the history of the transaction, beginning with the purchase at the public sale, and said, that courts will not enforce agreements in fraud of the law, or against public policy, is true. That an agreement not to bid at a sheriff's sale or at an auction of an executor would be against public policy, has been decided. The doctrine on this subject was thoroughly examined in the case of *Jones* v. *Caswell*, 3 Johns. (N. Y.), Cas., 29; 1 McLean, 300, 302; 2 Id., 276, *et seq.*; 1 Story Eq., 290. But this doctrine has no application to this

case. To apply it now, even if there were fraud, would be very much like a plea to an action of trover that the plaintiff had obtained the property in question of a stranger by deceitful practices, which would be absurd. This suit is not to enforce a contract. The contract had been completed years before the matters charged against the defendants.

There is nothing corrupt in such an agreement as that made by the parties in the instance stated in the plea. Nothing is more common than for several persons to join in a purchase of lands or other *valuable property at auction [*374 sales. There was no more harm in forming the Port Lawrence Company than there was in forming the Baum and Piatt Companies. There was no agreement that one, for a certain price, should not bid against the other, but that certain tracts, desired by both, should be purchased for both.

This was a great sale, advertised over the union, at which great numbers of persons were collected from different quarters. It was not like a neighborhood sale of chattels by an officer, and there was no danger of injury to the government or of the misleading of any man's confidence. The United States had fixed a minimum price on these lands. There was strong competition; and a price so large was given for the lands, that the Port Lawrence Company were compelled to relinquish the site of the town to the government. So the effect, at any rate, was not to cheat the country.

It would be a flagrant encouragement of fraud to say, that because Oliver and Piatt had formed such a partnership for their respective companies as that in 1817, Oliver and Williams (who bought of Oliver and thus came into the Port Lawrence Company) might in 1836 cheat all the others of the company out of their shares in the Port Lawrence lands.

It is contended that Baum did remain a trustee and agent for the Port Lawrence Company in respect to Nos. 1 and 2, after the surrender to the United States, as well as in respect to the other property of that company, and of the lands owned separately by the Baum Company and by the Piatt Company. That he was agent and trustee as to all the other lands, except 1 and 2, is perfectly apparent; and that Oliver acted for him, that he acted only through Oliver for all the time, is just as apparent upon this record. Baum never was on these lands—never was in that region of the country—all was intrusted to Oliver. Some temporary business was done by another Mr. Oliver, but under the instruction and assistance of this appellant. The duty of surrendering the lots was done by Williams, but this was a single act.

Oliver could not stand on any better ground than Baum,

whether he knew what Baum's powers were or not; or whether he acted as the sub-agent of Baum, or merely as his friend and for his accommodation, or not. If he acted as a volunteer, he could claim nothing of Baum or the company; but his claim must be upon the ground that his acts were at the instance of one or the other. He cannot, then, separate himself from the character of agent. He was acting for the company, not for Baum alone. He stood, then, as the company's fiduciary, and was bound to know how Baum stood to the company. Baum continued to be the agent and trustee for the other lands. This is undeniable. It is only said his agency may have terminated some time afterwards. He was just as much agent and trustee for the lots 1 and 2 after the relinquishment as before. The intention to reclaim them was manifested by his petitions to *Congress. These petitions are dated 30th January, 1822; the lands were relinquished 27th September, 1821. In his letter to Mr. Brown he says, "though the petition is signed by myself only, still others have an interest in it, to wit: Jacob Burnet, William Steele, M. T. Williams, J. R. Miller, and John Rowan, of Kentucky; but for the sake of convenience, all the lands by the company were transferred to me;" and after having referred to the argument in the petition he says, it will show "the just claim which, I think, I and my associates have on the government for redress." What was that redress? Why, that Congress should allow them to purchase the lots 1 and 2, so that they might build up the town laid off there, and in which they had sold lots.

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By his associates, he meant to include the Port Lawrence Company; and although he does not name them all in this letter, he names J. H. Piatt and M. Worthington in the postscript; showing that he was not acting for himself and the persons first named only.

In his letter to Mr. Brown, of the 6th of February, 1823, he speaks of the case on which he is petitioning, as "a ruinous one to me and my associates, and has resulted so from the acts of Congress more than other causes;" and he says, "all the tracts stood in my name, in order to render it more convenient to sell and convey."

The possession of these lots, Nos. 1 and 2, on which the town was laid out, was not by any means given up when the surrender was made of the title to the United States, but it was held by Baum until the patent issued to Oliver, as far as it appears in this record. (Mr. *Pirtle* referred to a great many parts of the record to establish this.)

The attachment in Michigan could give Oliver no title, for

several reasons. 1. No attachment would lie, because a mere equity, uncertain in its character, subject, according to the statements of Oliver, to balances due to Baum, could not be attached, and so the court had not jurisdiction. The old statutes of Pennsylvania are very general on the subject of foreign attachment; yet it has been held, that an attachment would not lie against executors, 2 Dall., 73; nor against money collected by a sheriff, 1 Id., 355. "A claim resting in damages and depending on a possibility only, is not attachable by foreign attachment." "For the same reason, foreign attachment lies not of a claim in covenant, because it sounds merely in damages." Serg. Attach. 76. "A legacy cannot be attached in the hands of the executor by foreign attachment, because it is uncertain whether, after debts paid, the executor may have assets to discharge it." Serg. Attach., 86. The statute of 1794, of Massachusetts, provides, that any creditor entitled to an action against his debtor, "having any goods, effects, or credits so intrusted or deposited in the hands of others," &c., may cause not only the goods and estate of the debtor, "to be attached in his own hands or *possession, &c., but also all his goods, effects, and credits so intrusted and deposited." In the case of *Picquet* v. *Swan et al.*, 4 Mason, 446, Mr. Justice Story says, "It is an extraordinary process, and from its nature can afford but a very imperfect administration of rights and remedies as to the litigant parties. Nor, as far as my limited experience has gone, has it enabled me to say, that in complicated transactions, where various and conflicting rights have been brought forward for controversy, the result has in a general view been such as entitled it to peculiar public favor on account of its advancement of public justice," &c. In 7 Mass. 274, the Supreme Court, in exposition of this statute remarks, that "pecuniary legacies in the hands of an executor are not goods or effects; and it is equally clear, that in no proper sense can they be denominated credits." See also 1 Pick. (Mass.), 399. These opinions go to show how this statute of Michigan should be construed. [*376

2. But if the court had jurisdiction, this was an improper procedure against the Piatt Company. The debt, if any, was against the Port Lawrence Company, and it was not in the power of Baum or of Oliver to fix it on the Piatt Company alone. There was no debt of the Piatt Company.

3. This attachment was evidently sued out for the purpose of getting hold of the lands; and not merely for the purpose of making the money pretended to be due. These lands were of much greater value at the time of the attachment than is pretended. The three sections attached were valued at the

time, by the commissioners appointed for the purpose, to $1,200. The sum pretended to be due, was $213.07. Piatt and Oliver lived near each other; Piatt was a man of wealth, at any rate of very competent means, and was weekly in the city where Oliver lived. It was much more convenient to Oliver, if he knew this demand to be just, to have made his money by coercion, or otherwise, in his own neighborhood, than to proceed in a wilderness and remote region—hundreds of miles off.

It is a principle of universal justice, that a party shall not be affected by the judgment of a court, who has not been party to the suit in which it is made. Who was the party that was to be warned to pay the money due on the mortgage, by the decree nisi? not Baum: for Oliver would not have received it of him; but the parties owing the debt, the Port Lawrence Company. Who was expected to defend the suit? not Baum; whose property was to be sold? the property of the Port Lawrence Company; and to be sold to their agent upon their agent's suit! It would be strange indeed, if they were not necessary parties in such judicial performances as this. The doctrine of necessary parties is stated in so many books, it would fatigue the court to cite them. See Story Eq. Pl., 187; 4 Pet., 202.

*877] Had a third person, ignorant of the rights of the company, purchased *the property under this decree, he might have held, just as he might have held under a purchase from Baum without notice. But Oliver's purchase was nothing. The assignment from Baum afterwards was nothing.

This purchase was on the 1st of September, 1828, and a few weeks before, on the 12th of August, a negotiation was commenced with the Michigan University, by Oliver, for the exchange of lots 1 and 2 for other lands in the neighborhood.

Oliver says he made the proposition for himself; but the records of the university show that he made it in behalf of "Baum and others." Baum had been struggling with the government for these lots 1 and 2, for several years, and the act of Congress passed for the benefit of Baum and others, and not for the benefit of Oliver. The government had been made to understand that Baum and his associates had suffered great loss in the purchase of the lots 1 and 2, which they had been compelled to relinquish after having laid out a town, and sold lots, &c. The deed from the university to Oliver purports to be made to carry into effect the act of Congress; and the patent that issued to Oliver purports to be issued "to carry into effect the intent of the aforesaid act, of the 13th January, 1830." The application of Oliver to the university for the

exchange in behalf of Martin Baum and others, was calculated to delude the members of the Port Lawrence Company; and the act of Congress, purporting to be for their benefit, and to carry out, in substance, what Baum had been asking of the government for eight years, was directly calculated to quiet their anxiety, and mislead them.

(Mr. *Pirtle* here referred to many parts of the evidence to show that Oliver had created an impression that he was acting for Baum and others.)

Suppose there was no combination between these parties, or any of them, and that the other members of the company were not necessary parties to the suit, yet Oliver, according to his statement, was a mere volunteer; he had made the payments to purchasers, by which his demand was created, because they were his friends and old associates, and he had obtained the mortgage from Baum, with a knowledge that Baum held the title for a special object only; and how can he be allowed to hold the property under such circumstances? The assignments by Baum to him are all of a piece with the sale under the decree. What court ever supported a transfer by an agent and trustee, of all the subject of the agency and trusteeship, to his friend, or sub-agent, under pretence of paying debts? The assignments were made by Baum to enable Oliver to seize the Port Lawrence property. The foreclosure of the mortgage had been made for that purpose. Thus the matter was fixed up between them to take all, in and out of Port Lawrence, and let the *cestuis que trust* lose all the [*378 money paid out for all the land, all *paid to Oliver, to Baum, and to everybody else; and a balance, the whole of Baum's account rendered, and two-thirds of Oliver's, still outstanding!

The lots 1 and 2 having been obtained with the lands of the Port Lawrence Company, by such means, and by persons standing in the relation in which Baum and Oliver stood, and in which Williams also stood, must be held in trust for the Port Lawrence Company. Williams was one of that company, and was bound to have notice of the manner in which Baum held, and the relation in which Oliver stood; and his denials amount to nothing. I need not trouble this court with reference to authority to support the general doctrine, that a fiduciary cannot hold for himself the subject purchased with the funds intrusted. There are some qualifications of the rule. But why should there be any here? This is not a case where so much money has been laid out in lands by one who held money in trust, either to lay it out in lands, or for any other purpose; that money has no ear-mark, does not make a

difficulty here. It is not a case, either, where justice cannot be rendered to the parties purchasing the land, if any thing further than a specific lien were given on the land purchased. But this is a case where the lands exchanged have been improperly obtained, and applied to the exclusive use of parties standing in a relation to compel them, in good faith, to divide the lands acquired, taking to themselves a sufficient compensation. It is not necessary that there shall be a direct violation of a formal trust, to allow the parties, claiming to have the benefit of the purchase, that privilege. *Docker* v. *Somes*, 2 Mylne & K., 655; 4 Kent. Com., 306; *Holt* v. *Holt*, 1 Ch. Cas., 19; *Walley* v. *Walley*, 1 Vern., 484; *Palmer* v. *Young*, Id., 276; *Lane* v. *Dighton*, Amb., 409; 1 Bro. Ch., 232; 2 Id., 287; *Phillips* v. *Crammond*, 2 Wash. C. C., 441; *Holeridge* v. *Gillespie*, 2 Johns. (N. Y.), Ch., 33. This case is very similar in its principles to the cases of a renewed lease, procured by an executor or guardian, when he shall be a trustee of the new lease; and of a surrender by one partner and a new lease taken to himself, where his partners shall hold him as a trustee, as in some of the cases just cited. The doctrine contended for has been uniform, from the decision of Lord Keeper Bridgman, in *Holt* v. *Holt*, says Chancellor Kent, to the present time.

Scott, on the same side, for appellees.

This cause is brought before this court by appeal from a decree of the Circuit Court of the United States, seventh circuit, and district of Ohio; and in its discussion we shall assume the following positions:

1. At the time lots 3 and 4, (except ten acres, part of lot 3, reserved,) and the three quarter-sections in the bill named, *379] were transferred by William Oliver to the trustees of the Michigan University, *in exchange for lots 1 and 2, said Oliver was the trustee, and Robert Piatt, the original complainant, and others, the *cestuis que trust* of the lands then given in exchange for lots 1 and 2—of the ten acres reserved, part of lot 3; of lot 86, (except sixty acres, parts thereof sold to Prentiss and Tromley;) of lot 87, and the south-east quarter of section 3, of township 3—all in the twelve miles reservation, at the foot of the rapids of the Miami of Lake Erie.

2. When Oliver received conveyances from the trustees of the Michigan University (and assignments of the original first certificates from Baum, and obtained a patent therefor) of lots 1 and 2, in exchange for the three quarter-sections of land which belonged to the Piatt Company, and for part of lot 3 and lot 4, which belonged to the Port Lawrence Company, he

became invested with the legal title to said lots 1 and 2, as trustee in trust for said Piatt and Port Lawrence Companies, from whom the consideration given for said lots 1 and 2 proceeded.

3. M. T. Williams is not an innocent *bona fide* purchaser. He is affected with notice at and prior to the respective periods in which he received conveyances from Oliver, of portions of the lands in question, and therefore holds the same as trustee, for the uses and purposes originally designed. 1 Phill. Ev., 410, 411; Com. Dig., tit. *Evidence*, B. 5; Plowd., 234, 430, 434; 2 Serg. &. R. (Pa.), 507; Gilb. Ev., 87; 1 Salk., 285; *Marchioness of Anandale* v. *Harris*, 2 P. Wms., 432; *Shelby* v. *Wright*, Willis, 11; Com. Dig., tit. *Estoppel*, A. 2.

4. Oliver as agent, and Oliver and Williams as trustees, are bound to account with and pay to the original complainant, Robert Piatt, his just proportion of the money and notes received by them on the sales of lots in Port Lawrence and Toledo, and lands adjacent, and to convey to him his just proportion of such parts thereof as remain unsold.

5. Oliver and Williams have no just cause to complain of the decree which has been rendered against them in the Circuit Court, as ample and more than liberal justice has been awarded to them, even if their conduct in the premises had been entirely untainted by fraud or a fraudulent design, and they had been merely acting under an entirely innocent but mistaken view of their legal rights. But it is respectfully submitted, that Robert Piatt, the heirs of Martin Baum, and the other defendants in interest, have just cause to complain of that decree.

The answers of all the defendants, except Oliver and Williams, to the amended bill of the original complainant, Robert Piatt, are in the nature of cross-bills, and respectively ask for similar relief, as respected him or themselves, to that prayed for by the complainant, Robert Piatt.

It was therefore proper for the court, in rendering the decree, to *adjust and settle the interests and [*380 claims of all the parties to the record.

I. (Mr. *Scott* related the formation of the Port Lawrence Company.)

The partnership thus formed was neither universal nor general, but limited and confined to the objects set forth in the instructions, &c., given to Oliver, and the facts to which we shall refer, from which the rights, duties, and obligations of Baum, the trustee, and Oliver, the agent, are to be ascertained.

It is conceded that Baum continued to act as trustee until

his death. That Baum's powers were restricted to a general oversight of the company's business, and the execution of conveyances of the lots and lands when sold, we also infer from the following facts:

Baum, in his letter to Brown, 25th December, 1822, says: "For the sake of convenience, all the lands, by the company, were transferred to me." In his letter to the same, February 6th, 1823, he also says: "All the tracts stood in my name, in order to render it more convenient to sell and convey;" and in his letter to the commissioner of the General Land Office, July 20th, 1827, he says: "These lands, though bought in sundry persons' names, were afterwards transferred to me as agent, for the purpose of managing and conveying them in case of sales." All the certificates, for the purposes aforesaid, were assigned to Baum.

Oliver, as agent, with the assistance of Schenck, proceeded to lay out the town, advertised a sale of lots, and sold a number of lots. His instructions confined him to the sale of a certain portion of the lots, fixed the terms of sale, and required him to give certificates of purchase, in the nature of title-bonds, for a conveyance by Baum, the trustee. He was to open an immediate correspondence with Baum relative to the interests of the company, and was informed, that any instructions he might thereafter receive from Baum, the trustee, were to be considered as coming directly from the proprietors themselves. This is all shown by his instructions, his bond to Baum, and power of attorney from Baum.

The letter given by Baum to Oliver, notifying him of his appointment, which relates particularly to the salary he was to receive, would seem to restrict his agency to one year; but his appointment by the company was without limit as to time. His appointment being without limit as to time, the law presumes a continuance of his agency. (See Stark. Ev., 46, 50, 51, cited.) Oliver insists that he never acted as agent of the Port Lawrence Company after his resignation, in May or June, 1818. But the following facts and circumstances show that his agency extended beyond that period, and that he still stands in that relation to the company.

(Mr. *Scott* here referred to numerous parts of the record.)

We thus deem the agency of Oliver, from August, 1817, the date of his original appointment, down to the 20th June, 1834, established; *the consequences resulting from *381] which agency will be examined hereafter.

Oliver was one of the original proprietors of Port Lawrence; and, although he may have transferred his interest in the company to others, in 1818 and 1819, as he alleges in his

answer, yet all the liabilities against said company had accrued prior to said transfers. These transfers did not discharge him from the liability to persons who had claims growing out of purchases made prior to his transfers, which liabilities have not yet been entirely satisfied. (See Collyer Partn., 4, 105; and Story Partn., § 358.) No settlement among the original proprietors or their legal representatives or assignees has ever been made; his relation, therefore, to the company, as one of the original partners, still remains, and the consequences of this relation will also be examined during the progress of the cause.

The pressure of the times and other causes rendered it indispensably necessary for the company to avail themselves of the benefit of the act of Congress for the relief of purchasers of the public lands prior to the 1st day of July, 1820, by the relinquishment of lots 1 and 2, and the application of the money paid thereon to the payment of the purchase money of other lands bought by them. The amount paid on tracts 1 and 2 was $4,817.55½. The balance due on lots 3, 4, 86 and 87, was $1,402.36½; and the balance due by the Piatt Company, for their five quarter-sections, was $1,248. In order to facilitate, therefore, the application of the moneys paid on said lots 1 and 2, the original first certificates of the purchase of said lots 1, 2, 3, 4, 86 and 87, and the five quarter-sections, were all assigned to Baum.

M. T. Williams, as agent, made the relinquishment of said tracts 1 and 2, and applied the moneys arising therefrom to the discharge of the balances due on the lands retained, September 27, 1821, and the surplus remaining after such payment was $949.21, one-half of which, viz., $474.60½, belonged to the Piatt Company. This balance, by arrangement between the parties, was applied to the payment of lands which had been purchased by the Maumee and Sandusky Company, and which was to be accounted for as part of the Piatt Company's portion of the liabilities of the Port Lawrence Company.

All the defendants, except Oliver and Williams, distinctly admit that the five quarter-sections were assigned to Baum for the purposes above named, and that no consideration moved, or was intended to move, from Baum to the Piatt Company, as an inducement to said assignments. Neither Oliver nor Williams deny that the assignments were made for the above purposes. The assignments being thus made for the above purposes, those purposes being accomplished, a trust resulted to the Piatt Company in said five quarter-sections. See *Jackson* v. *Mills*, 13 Johns. (N. Y.), 463; *Boyd* v. *Lane*, 1 Johns. (N. Y.) *Ch., 582; *Wallace* v. *Duffield*, 2 [*382

Serg. & R. (Pa.), 521; *Foote* v. *Calden*, 8 Johns. (N. Y.), 216; *Trustees of the Methodist Episcopal Church* v. *Jacques*, 1 Johns. (N. Y.) Ch., 450; *Botsford* v. *Burr*, 2 Id., 405; *Huston* v. *Hamilton*, 2 Binn. (Pa.), 387; *Deg* v. *Deg*, 2 P. Wms., 412.

(Mr. *Scott* then referred to various parts of the record to show that when lots 1 and 2 were relinquished, it was done with an understanding and determination, among the original proprietors, to re-purchase them, and go forward with the enterprise of building up a town; and then argued, from the following propositions, that Oliver intended to defraud his associates.)

1. In order to place himself in a situation in which he might secure to himself a part or the whole of the five quarter-sections belonging to the Piatt Company, Oliver procured from M. Baum the certificate dated September 10, 1822.

The giving of that certificate did not fall within the scope of Baum's authority as trustee. See Story Partn., § 111.

The accounts between the partners could not be split up, as contemplated by that certificate, so as to render one partner liable in his individual capacity for claims against the whole of the partners.

At the time that certificate was given, nothing was due from the Piatt Company to the Port Lawrence Company, but, on the contrary, the sum of $191 was due from the latter to the former. No suit at law could be maintained by Oliver, the agent, for the recovery of the amount of said certificate, it being fraudulent and void; and if a just demand, it was due from the Port Lawrence Company, and not the Piatt Company, and a suit could not be maintained on it against the Piatt Company. See Story Partn., §§ 234, 235, 236, and 128; *Jackson* v. *Rawlins*, 2 Vern., 95; *Maddox* v. *Jackson*, 3 Atk., 406; *Anon.*, 2 Freem., 27.

2. Oliver's letter to R. Piatt, February 3, 1823.

3. No demand for payment of said certificate was ever made upon the Piatt Company, or any of its members; nor was there ever any legal proceedings instituted against them where they resided.

4. The very fact of instituting legal proceedings in a foreign jurisdiction, against the property of the Piatt Company, at a point situated more than two hundred and fifty miles from the residence of any of the members of the Piatt Company, and which point could only be reached by passing through a dense and uninhabited wilderness, whilst most of those members resided in the immediate neighborhood of Oliver, furnishes strong evidence of a fraudulent and ulterior design on the

part of Mr. Oliver to secure to himself the property of the Piatt Company.

5. At October term of the County Court of Monroe county, Michigan Territory, 1825, Oliver sued out a writ of foreign attachment on the aforesaid certificate, against Martin Baum, Robert Piatt, *George A. Worth, and William M. Worthington, survivors of Martin Baum, John H. Piatt, (deceased,) Robert Piatt, George A. Worth, and William M. Worthington, late joint partners. The manner in which this attachment was sued out would seem to furnish conclusive evidence of a fraudulent intent. George A. Worth never was a partner, nor had any interest in the Piatt Company; nor were Martin Baum, John H. Piatt, (deceased,) Robert Piatt, George A. Worth, William M. Worthington, late joint partners. The three quarter-sections on which the attachment was levied did not belong to the persons named in the attachment, but to the representatives of John H. Piatt, (deceased,) Robert Piatt, Gorham A. Worth, and William M. Worthington. This is not like the case where process has been served on an individual by a wrong name, in which case he has an opportunity of appearing in court and pleading the misnomer in abatement. In attachment, the proceedings being *in rem*, if the property on which the attachment be levied belong not to the defendants named in the writ, it is respectfully submitted that the court has no jurisdiction in the case. Even if the notice which seems to have been given of the pendency of the attachment had by accident reached the members of the Piatt Company, they could not have supposed that they were the persons intended. The plaintiff, in all such cases, proceeds at his peril. *Kilbourn* v. *Woodworth*, 5 Johns. (N. Y.) Ch., 40; *Fisher* v. *Lane*, 3 Wils., 297; *Phelps* v. *Holkirk*, 1 Dall., 261; *Kibby* v. *Kibby*, Kirby (Conn.), 119; *Buchanan* v. *Bucker*, 9 East, 192; *S. P. Robertson* v. *Ex'rs of Ward*, 8 Johns. (N. Y.); and *Fenton* v. *Garlick*, Id. 152; also, Manuscript F, p. 6. [*383

At the time of the levy, judgment, and sale, under the attachment, the legal title to the three quarter-sections levied on remained in the United States; the evidence of the equitable title was vested in Baum; and the only claim which the Piatt Company had was a mere resulting trust, not subject to be levied on under attachment or execution; and, consequently, the whole proceedings under the attachment, the conveyance to Noble, and by him to Oliver, were absolutely null and void. *Lessee of Abraham's heirs* v. *Will et al.*; 6 Ohio, 164; 2 Pow. Mortg., p. 457, A; Co. Litt. 35, A; MS.

p. 7, &c.; and the opinion and authorities cited by his honor Judge McLean, in giving his opinion in this case, pp. 20, 21.

Oliver's title to the three quarter-sections purchased under the attachment was not strengthened by taking assignments of the original first certificates of purchase from Baum, nor by the attainment of patents under them; for by having notice of the trust, he himself became the trustee to the Piatt Company. See *Lucas* v. *Mitchell*, 3 Marsh. (Ky.), 244; MS. letter G, p. 9. The procuring an assignment of the original first certificate of purchase of the fourth quarter-section from Baum, and obtaining a patent under it, he having notice of the *trust, constituted him a trustee to the Piatt Company for that quarter-section.

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6. On the 27th day of August, 1823, Oliver fraudulently, and in violation of the great confidence reposed in him by Baum, the trustee, obtained from him a mortgage of all the property belonging to the Port Lawrence Company. This mortgage was obtained in order to secure Oliver for his proportion of the moneys for the purchase and improvements of lots 223 and 224, in Port Lawrence; the amount contracted to be paid to B. F. Stickney, for lots and improvements in Port Lawrence which he surrendered; and the amount charged for his (Oliver's) services and expenses in settling with Stickney, and transacting other business for the company, to the entire exclusion of the interests of Baum, and all the other proprietors and creditors of the Port Lawrence Company.

Baum, as trustee, had no authority to execute the mortgage, as his powers were limited, from his own showing, to that of executing conveyances for the lots or lands, in case of sales of lots by the agent, Oliver, or of the lands by order of the *cestuis que trust* themselves. Story Partn. §§ 111 and 101, commencing on p. 156; and Manuscript, p. 20, letter M. Oliver could not sell the lands to himself, and it is clear that no sale was made to him by the *cestuis que trust*.

The mortgage is fraudulent, as it related to Baum, and given to rid himself of the importunity of Oliver.

No notice of the existence of this mortgage seems ever to have been given to the members of the Port Lawrence Company, by Oliver.

In October, 1825, Oliver filed his bill in the Supreme Court of Michigan Territory, sitting as a court of chancery, against Baum, praying a decree for payment of the moneys due on said mortgage, by a short day, to be named; and, in default thereof, that Baum, and all claiming under him, might be forebound of and from all equity of redemption, of, in, and to, the mortgage premises, and might deliver over to the plaintiff

all patents, deeds, demises, and writings, whatever, relating to said premises. In 1828, it was decreed that the defendant redeem the mortgage premises by payment to the complainant of $2305.96 and costs, by the 1st of July next thereafter, or, in default thereof, that the mortgage premises be sold. The mortgage premises were afterwards sold to Oliver, by the assistant register, for the sum of $618.56, and a deed made to Oliver.

The proceedings, decree, and sale, under the mortgage, were they valid, have not extinguished the rights of the *cestuis que trust* of Baum, they not having been made parties to the suit. See 4th section of an act of the territory of Michigan, approved April 12, 1827, page 204, directing the mode of procedure in chancery; *Gore* v. *Stackpole*, 1 Dowl. P. C., 1831; 3 Pow. Mort. 978 a, in note; *Haines et al.* v. *Beach et al.*, 3 Johns. (N. Y.), Ch. 459; *Draper v. *The Earl of Clarendon*, 2 Vern. 517; *Godfrey* v. *Chadwell*, Id. 601; *Moret* v. *Westiene*, Id., 663; *Hobert* v. *Abbott*, 2 P. Wms., 643; *Tell* v. *Brown*, 2 Bro., 276; *Polk* v. *Clinton*, 12 Ves., 48, 59; *The Bishop of Winchester* v. *Beaver*, 3 Id., 314; Same v. *Paine*, 11 Id., 19, 198; *Shannon* v. *Cox*, 3 Ch., 46; *Needler* v. *Deeble*, 1 Ch. Cas., 299; *Monday* v. *Monday*, 4 Ves. & B., 228; *Calvery* v. *Phelps et al.*, 6 Madd., 228; MS. letter H, p. 9. [*385

7. A part of the debt, to secure which the mortgage was given, was due from Oliver himself; only a part of the debt was at all justly due by the company, as the rents of the warehouse, as before stated, should have been deducted therefrom.

If it were not intended by Baum and Oliver that the repurchase of lots 1 and 2 should inure to the benefit of the Port Lawrence Company, then the following facts and circumstances furnish additional evidence of a fraudulent intention:

8 Baum's letter to the commissioner of the General Land Office, dated January 20, 1827.

9. Oliver's negotiation with the trustees of the University of Michigan Territory.

10. The several acts of Congress above referred to, authorizing the exchange of lands by the University of Michigan Territory, with Oliver, for lots 1 and 2, and the issuing of the patent to Oliver for said tracts. 6 Laws U. S., 550.

11. The assignments by Baum to Oliver of the original first certificates of purchase of the mortgage premises and the four quarter-sections. The procurement of those assignments did not better the condition of Oliver. See *Freeman* v. *Barnes*, and *Dikton* v. *Greenville*, 1 Vent., 82; Id., 239, and 1 Sid., 460; *Focus* v. *Salsbury*, Hard., 400; *Bowles* v. *Stewart*, 1 Sho. & L., 228; *Keneday* v. *Daily*, Id., 379; *Lord Portsmouth* v.

Vincent, cited in *Lord Ponflet* v. *Wardson*, 2 Ves., 476; *Thynne* v. *Carey*, W. Jones, 416; *Kennoul* v. *Greeville*, 1 Ch. Cas., 295; *Bovey* v. *Smith*, 18th Dec., 1676; *Salesbury* v. *Bagot*, Lord Not. MSS., 2, Swanst., 610, and MS. letter I, p. 12.

12. The contract between Oliver, Baum, and Williams.

13. The change of the name of the town of Port Lawrence, which was established by the proprietors in 1817, to that of Toledo, in 1835, long subsequent to the death of Baum.

14. The sale of shares, and town-lots, and tracts of land, belonging to the Port Lawrence Company, in violation of the trust and confidence reposed in him by the proprietors of that company.

15. The enormous amount of money recklessly and most injudiciously expended, under the plea of improvements, without the authority or concurrence of the owners, viz., $42,813.41.

16. The pleas interposed by Oliver and Williams, in order to prevent a disclosure of their frauds, and to bar the proprietors from asserting their rights.

*386] *17. After the rendition of the interlocutory decree, when Oliver and Williams were compelled to render an account, the enormous and unconscionable demands made by them, before the master, for compensation for their services in an abortive attempt to wrest the property from its rightful owners, in order to swallow up the large amount of money in their hands belonging to their *cestuis que trust*, furnishes conclusive evidence of their fraudulent designs.

We have thus traced the course of Mr. Oliver from 1817, the time at which he became a member of the Port Lawrence Company, and was appointed the agent to manage its concerns, and the course of M. T. Williams from 1819, when he became a proprietor in the Port Lawrence Company, down to a period subsequent to the exchange of lands made by Oliver with the trustees of the University of Michigan Territory, for lots 1 and 2; and we therefore respectfully submit, that we have clearly established the position with which we set out, namely, "that at the time lots 3 and 4 (except ten acres, part of lot 3 reserved) and the three quarter-sections, in the bill named, were transferred by William Oliver to the trustees of the Michigan University, in exchange for lots 1 and 2, said Oliver was the trustee, and Robert Piatt the original complainant, and others, the *cestuis que trust* of the lands then given in exchange for lots 1 and 2—of the ten acres reserved, part of lot 3—of lots 86 (except sixty acres, parts thereof sold to Prentiss and Tromley)—of lot 87, and the south-east quar-

ter of section 3, of township 3, all in the twelve-miles reservation at the foot of the rapids of the Miami of Lake Erie.

At the time of the exchange, the parties stood related to each other as follows: Oliver was the trustee and the Piatt Company were the *cestuis que trust* of the four quarter-sections, and Oliver was also the trustee, and the Port Lawrence Company were the *cestuis que trust* of lots 3, 4, 86 and 87, (except sixty acres, parts of 86, sold to Prentiss and Tromley.)

II. When Oliver received conveyances from the trustees of the Michigan University (and assignments of the original first certificates from Baum, and obtained a patent therefor) of lots 1 and 2, in exchange for the three quarter-sections of land which belonged to the Piatt Company, and for part of lots 3 and 4 which belonged to the Port Lawrence Company, he became invested with the legal title to said lots 1 and 2, as trustee in trust for said Piatt and Port Lawrence Companies, from whom the consideration given for said lots 1 and 2 proceeded.

1. The relation in which Oliver stood connected with the Port Lawrence Company, as an original proprietor, partner, and agent, many of the accounts and claims against which remained unadjusted and unsatisfied at the time of the exchange, he could not, consistently with the principles of equity, acquire property for his own use, the obtaining [*387 of which would defeat the very object of the *original association. (See *Parkhurst* v. *Alexander*, 1 Johns. (N. Y.) Ch., 394; *Green* v. *Winter*, Id., 26; *Evertson* v. *Tappan*, 5 Johns. (N. Y.), 497; *Halley* v. *Manlius*, 7 Johns. (N. Y.) Ch., 174; *Mathews* v. *Degaud*, 3 Desaus. (S. C.), 28; *Anderson* v. *Stark*, Hen. & M. (Va.), 245; *Hudson* v. *Hudson*, 5 Munf. (Va.), 180; *Mosley's administrator* v. *Buck & Brander*, 3 Id., 232; *Buck & Brander* v. *Copeland*, 2 Call. (Va.), 218; *Prevost* v. *Gratz*, 1 Pet., 373; *Hart* v. *Tenyke*, 2 Johns. (N. Y.), Ch., 62, 104; *White* v. *Brown*, 2 Car. Law R., 429; *Howel* v. *Baker*, 4 Johns. (N. Y.), Ch., 118; *McClenneghan* v. *Henderson*, 2 Marsh, 329; *Van Horn* v. *Fonda*, 5 Johns. (N. Y.), Ch., 388; *Holdridge* v. *Gillispee*, 2 Id., 30, 252; *Reyden* v. *Jones*, 1 Hawk. (N. C.), 497; *Conway* v. *Greene*, 1 Har. & J. (Md.), 151; Mathews, 389; 2 Sim. & Stu., 49, 50; 1 Wils. Ch. Cas., 1; 10 Ves., 428, 429; 6 Id., 625; *Lucas* v. *Mitchel*, 3 Marsh. (Ky.), 244; Hon. J. McLean's opinion in this case, and the authorities cited by him, p. 31; MS. letter E, p. 3, and letter G, p. 9.)

2. As the entire consideration given for lots 1 and 2 proceeded not from Oliver, but from the Port Lawrence and Piatt Companies, a trust resulted to them in the lands thus acquired

with their means. (See the authorities relating to resulting trusts, and trusts arising by operation of law, hereinbefore referred to, MS. letter D, p. 2.)

We have now, we submit, demonstrated the original complainant, Robert Piatt's, right to a decree against Oliver and Williams, for his just proportion of lots 1, 2, 86, 87, of the ten acres reserved in 3, and the one quarter-section named in the bill remaining unsold, and for his just proportion of the moneys, &c., remaining in their hands, arising from the sales to others of part of the lots and lands in question.

3. M. T. Williams is not an innocent *bona fide* purchaser. He is affected with notice at and prior to the respective periods in which he received conveyances from Oliver, of portions of the lands in question, and therefore holds the same as trustee, for the uses and purposes originally designed. 1 Phill. Ev., 410, 411; Com. Dig. tit. *Evidence*, b. 5; Plowd., 234, 430, 434; 2 Serg. & R. (Pa.), 507; Gilb. Ev., 87; 1 Salk., 285; *Marchioness of Anandale* v. *Harris*, 2 P. Wms., 432; *Shelby* v. *Wright*, Willis, 11; Com. Dig. tit. *Estoppel*, A, 2; MS. letter K, p. 16.

4. Oliver as agent, and Oliver and Williams as trustees, are bound to account with and pay to the original complainant, Robert Piatt, his just proportion of the money and notes received by them on the sale of lots in Port Lawrence and Toledo and lands adjacent, and to convey to him his just proportion of the lots remaining unsold.

Ewing, for appellants, in reply and conclusion, divided his argument into different heads, and directed his attention
*388] chiefly to the facts in the case.

*1. The agency of Oliver.

This commenced on 14th August, 1817, by three papers of that date: 1. Power of attorney. 2. Letter of instructions. 3. Letter limiting it to one year.

The account presented by Oliver to Baum, referred to in the answer, is now a file in the cause, and is also inserted *in extenso*, in the master's report. By this it appears, taking the date as our guide, that Oliver was paid his salary down to the 4th day of July, 1818. To this the sum allowed him also conforms. He entered into the service of the company on the 14th of August, 1817. He was allowed a salary of $1200 a year. He was paid on settlement $1070, which would be the amount due him on the day the item bears date. The same paper shows a full settlement and payment by him of all the funds in his hands, and a balance overpaid by him was placed to his credit on the private books of Baum, and passed

by Baum to his own credit as against the company. All the papers relating to this settlement, which are referred to in the answer of Oliver, as delivered over to Baum, are found in bundle A, of papers accompanying the master's report numbered in blue ink from 374 to 382. Among them is an account of Baum with the Port Lawrence Company, showing a final settlement with Oliver, and charging separately to each of the two companies whose union constituted the Port Lawrence Company, its half of the amount found due to Maj. Oliver, and paid over by them to Baum. On a simple view of these facts it is difficult to perceive how it can be contended for a moment that the agency in which Oliver was engaged in 1817, was a perdurable, continuing agency. It expired by its express limitation at the end of one year—so says the answer of Oliver—so says the letter of Baum, accompanying the power. The answer states that before the year expired, in the beginning of July, 1818, the agency was ended by mutual consent, the accounts of the agency closed, and all the papers relative thereto surrendered. The file above referred to, from Nos. 374 to 382, (original papers,) shows conclusively the same fact. See Story's Agency, 499.

There was no agency on the part of Oliver from July 4, 1817, until after the relinquishment in September, 1821, and this will be considered under the seventh head.

2. Oliver a partner.

It is said by the other side that he was a partner. But he sold out his shares in 1818 and 1819, and both his vendees were acknowledged as partners. At the time of these sales, the partnership was not indebted. It is true, he could not have exonerated himself from liability to those persons to whom lots had been sold. He was bound to make his contract with them good. But he was not a party to the relinquishment in 1821, and it may be doubted whether he would have been liable in equity, to the other partners, for a debt created by the relinquishment. The funds obtained by it from [*389 the *United States were applied to the payment for other lands, instead of going to cancel the obligations outstanding to purchasers of lots.

3. The nature of the partnership and the powers of Baum to and at the time of the relinquishment.

The company was a *quasi* corporation, represented by a head or committee. The books are full of such cases. When these associations are legal, they are recognised both at law and in equity. One is called in Vesey the "fruit club," and the court said it was sufficient to make the "committee" parties, and not necessary to include all the members of the club.

So in the *Covent Garden* case. Baum had all the title, and in consequence of his own extensive powers, granted a power to Oliver. We must judge of Baum's powers by his acts. The certificates were held by him. It is said that this power ceased when 1 and 2 were relinquished. But at that time a large debt existed. Seventy-nine covenants of Baum were all broken, and a debt of more than $4,000 created at the instant of relinquishment. The avails, amounting to $4,817.55, were applied to other lands, and those lands ought to have been placed in the hands of Baum as a security for his liabilities. The partnership was not over; the debts had to be paid. The bill says that Baum had no power to sell, but the answer asserts that he had, and this is confirmed by the evidence. In 1821, at the relinquishment, Baum had the title. All covenants were made by him in his own name, or by Oliver in the name of Baum; and these covenants, such as the sale to Tromley and Prentiss, were acquiesced in. He was liable for all the improvements on 1 and 2, and it was natural that the certificates for the lands which had been fully paid for, should be placed in his hands. The court below say that no debts existed; but this is an error. It is said that the defendants (except Oliver) admit that the transfer of the certificates was made to Baum only to enable him to perfect the title. This is admitted by one of the nominal defendants, but the active prosecutor, who has admitted $100,000 into his own pocket. It does not bind us. There was no necessity for such a transfer to enable Baum to complete the title, (for the script was receivable for any lands within the district,) without reference to their being owned by the same man who held the script. The only good reason that can be given is, that it was done to secure Baum. This claim was not made until he died. How does it happen that the title to the quarter-sections was suffered to remain in Baum for fourteen years, unless it had been placed in his hands as security. Equity would have kept it there, if an effort had been made to take it away. The security was scarcely sufficient, because the lands had been bought at $2, and the price of lands reduced to $1.25 per acre. The interpretation which must be given to these acts of the parties concerned is, "we mean to pay you, but if we do not, there is an adequate fund;" of course, the property
*390] *was subject to sale by Baum to pay debts, and he had a right to pay a debt due to himself as well as one due to another person.

4. Fraudulent combination between Baum and Oliver.

It is charged that as early as 1821 there was a plan laid by these two men to defraud the other members of the Port-

Lawrence Company of this property; and that such combination was carried on for six succeeding years, until 1828, when, at last, they got possession in the name of Oliver by virtue of a sale in chancery.

The cost of these tracts at the sale in 1817 was less than $1,800; their value from 1822 to 1828 was less than 1,000. It is taxing the credulity of men greatly indeed to ask them to believe, that for the possession of wild land such as this, so remote from his residence and so little attractive as it then was, Baum would combine with Oliver or any one else, and by a long train of artifice and fraud, continued and practised for a series of years, pursue this as the great and absorbing object of his life.

But if the motive were adequate, and the supposition not contradicted by probability, the evidence in the case wholly repels such a conclusion.

Baum was not the man who would engage in such a dishonest combination. He was not in a condition to do it, if he had been base enough for the purpose. His state of mind at the time was such as wholly precludes the idea. On these points there is abundant evidence, to some of which I will refer.

(Mr. *Ewing* here referred to various parts of the record.) It appears, then, that there were seventy-nine outstanding covenants by Baum, some as small as $15, some as large as $1,000, but all vexatious. He was the only person troubled about them, and had been, during all his previous life, a nervously punctual man. Some of the witnesses say, "they feared for his intellect." In this condition he applied to Oliver, a young man whom he had taken by the hand and who was familiar with the subject. The first measure of relief was to buy up the small vexatious claims. Ten were bought up for $231. The people there all knew Oliver—he had been out in the north-western campaign. Baum paid these claims: that is the fraud; and paid them through Oliver: that is the combination. Was it wrong in Oliver to do this? His conduct is consistent with the best as well as with the worst motives. Baum is now dead, and his son-in-law, to whom his papers descended, now comes here to fasten fraud upon him. He wished to refund the money which Oliver had thus advanced, but not being able to do so, gave him a certificate, acknowledging the debt.

5. The certificate of $218.07.

The complainant, for the purpose of making out a case of fraudulent concealment and sinister purpose upon the part of Major Oliver, avers, that though he, the complainant, lives, and lived at that time, on the Ohio river, within forty miles

of Cincinnati, and was weekly *in the city, where Baum and the defendant resided, he never knew any thing of the alleged indebtedness until he received a letter from Major Oliver, some time in 1823; and that this was all the knowledge he had upon the subject, for the order never was presented to him to be paid or rejected, until suit was brought upon it, in attachment in Michigan.

In reply to these allegations, the defendant, Oliver, answers, and "denies that there was any fraud or unfairness in said certificate for $213.07, dated September 10th, 1822, mentioned in the bill; and he says, that the same was justly due to him from the Piatt Company, for one-half the amount previously advanced by him, at the request of Baum, to reimburse purchasers of lots in Port Lawrence, for which an account was rendered to said Baum at the time, with the vouchers therefor. This defendant has not in his possession the means of re-stating that account, but believes that the exhibit Q, attached to complainant's bill, contains a true statement of that matter, and that the item of $426.14 on the debit side of that account shows the lots for the refunding the purchase money of which said certificate was given in part, being the half thereof, due from said Piatt Company; and that said defendant repeatedly, at different times, in 1822 and afterwards, requested said complainant to refund to him the amount of said certificate, which the said complainant always avoided or refused to do; and this respondent distinctly told the complainant, that he would attach said quarter-section to satisfy said debt, unless it was otherwise paid; and defendant repeatedly requested payment of the same both before and after his letter to complainant of February 3d, 1823, referred to in the bill, and even offered to surrender up or release to said complainant said land after he had acquired the title, if said complainant would pay said debt of defendant."

This statement in the answer is responsive to the bill, and therefore evidence in the case; it shows an early and repeated request on the part of Major Oliver to the complainant to pay him in behalf of his company what was justly due to him. It shows that the complainant evaded or glanced off every attempt on the part of this creditor to converse with him about the matter, until at last Oliver felt it was necessary to act, or submit to the loss of what he had advanced. He, therefore, on the 3d of February, 1823, five months after the date of the certificate, enclosed a letter to the complainant, in which he states to him the reasons why he incurred the liability, and the fact that the one-half due by the Baum Company had been paid him. It is obvious from the letter,

that he recognizes the complainant, since the death of J. H. Piatt, as the head of the Piatt Company, and he requests him to use his influence with the administrators of John H. Piatt to pay their proportion, and advise him of the names of the members of the Piatt Company as then existing, and their several interests.

*In the argument in the court below, we thought this account could not be re-opened for examination. [*392
It was a statement of a partnership account by the acting partner, communicated to all concerned, and acquiesced in by them for twelve years; especially after the trustee was dead, and his papers were in the hands of an interested party; and more especially, that those who claimed collaterally, who had no custody of these accounts or power over them, ought not to be called upon, under such circumstances, to vouch the account or forfeit their right. We thought that, explained or unexplained, the account was binding on the parties, so far as third persons were concerned. The learned judge held otherwise, and this error, as we respectfully contend it is, combined with important mistakes in point of fact, lies at the foundation of the decision below. (Mr. *Ewing* here went into an elaborate examination of the record for the purpose of showing that the account was correct.)

6. The mortgage.

In the month of August, 1823, Oliver stated an account of payments made by himself and Baum for lots 223 and 224, and also an exact account, confirmed by original vouchers, of all the expenditures in improving the lots. He credits Baum with one-half the expenses, borne by himself, for which he had from time to time advanced money to Oliver. He charges also what he had paid to Benjamin F. Stickney for his advances and improvements upon his lot, as compromised pending his suit, and the whole account, amounting to $1,835.47, was presented to Baum for liquidation. Baum, being without funds of the company, and owing to his own pecuniary embarrassments, which then pressed heavily upon him, unable himself to advance anything, mortgaged the property of the company which remained in his hands to Oliver, and by his circular of January 31st, 1824, informed the individual members of the company of what he had done and the state of their indebtedness, and earnestly solicited them to make some provision or put it in his power to provide for the payment, so that the property might be made available to cover their liabilities, which, he assures them, is the most that can possibly be expected. The other members of the company, who had placed Baum in the front of difficulty and trouble, turned

a deaf ear to his suggestions and remonstrances: they did not even deign to answer his letter. The complainant, who resided but forty miles from Cincinnati, and who was in the city weekly, did not even call to examine the account, to inquire into the state of affairs, or speak a single word of cheering or encouragement to his partner and agent, who was left to bear, himself, their accumulated burden of misfortune and loss.

It seems to me that there was openness and publicity enough upon the part of Baum in this and all his other acts to secure even a man of doubtful character from the imputation of fraud, design, or concealment. And in the case of the *393] mortgage he had magnanimously *cast out of the account all that applied to himself—his own payments to the company for the lots—his expenditures on their improvement, and contented himself as well as he could to suffer the loss, so that those who had trusted to him, and relied upon his good faith, should come by no injury.

Proceedings upon this mortgage were not commenced by Oliver until about twelve months after the money fell due. In the mean time, he avers in his answer, which, though responsive to no special allegation, is clearly so to the general scope and tenor of the bill, that he used every effort to collect this money of the parties, and especially, that he repeatedly applied for that purpose to the complainant. I do not however conceive this to be a matter of great importance. The indisputable fact is shown by the letter of Baum to all the partners, in 1824, that they all knew that such mortgage had been given to pay the debts of the company, and that, if the money were not paid, the property would be proceeded against by the mortgagee in due course of law. There is, therefore, no ground to complain of secrecy or concealment, and the question arises solely upon the legality of the transfer, including the execution of the mortgage, the proceedings in chancery under it, the decree, the purchase, and the final assignment of the certificates by Baum to Oliver after the sale. These are questions of great importance, and merit a careful consideration.

The right of Baum to sell and convey rests on two grounds:

1st. Because the property was personalty in his hands as acting partner.

2d. As trustee of the real estate vested in him for the payment of debts.

1st. It was personalty.

It is objected, that the land in this case cannot be considered as personalty, on the authority of the case where land connected with a factory was drawn into question. But

there the land was not the subject-matter of the trade. Portions of the freehold in a mine have been severed and sold. It is true, that in the case before us there was no authority to re-invest. But in principle, why should this make a difference? The land here was bought to sell again, and partnership debts were contracted. What good reason can be given, why it should not vest in the acting partner in the same manner as goods?

2d. But Baum was a trustee.

Having the title in himself, without any expressed restriction, he is presumed to hold it for all the purposes to which equity would apply it, and his act was confirmed by acquiescence in the sales to Prentiss and Tromley, and in this mortgage for twelve years. It is objected that an unreasonable amount of property was mortgaged. But the debt was $1,835.47, and the first cost of the tracts mortgaged [*394
*was $1,679.14, and their value had been reduced by the act of Congress reducing the price of public lands, to $1,049.14; estimated in proportion. It was the duty of Baum to audit accounts and to sell and convey property to pay debts. A mortgage by him, and a decree of foreclosure against him, are equivalent to his deed of bargain and sale. We hold that the sale under the mortgage gave to Oliver all the title of Baum, and a right to a patent. But if not, if there be anything irregular or imperfect in the pursuit of our right, it is cured by the assignment of the certificates and the patent. How stands the case? Oliver has the legal title, and he is called upon to surrender it. He has got it in payment of a debt, fairly, from a person having power to settle the debt and convey the land. But this trustee, so empowered, took two steps instead of one. He first mortgaged, then assigned. In law, his mere assignment is good enough. Can this difficulty as to mode affect us in equity? There is no reason why this legal title, so acquired, should be now disturbed. The complainant had full notice of the mortgage, and of the suit thereon. He stood by: suffered the suit upon the mortgage to proceed without coming in and making himself a party, as he might have done; suffered the sale to be made without objection; the certificates to be assigned and the patent to issue; suffered Oliver to enter upon the property, expend his time, and talents, and money, upon it; and we now claim that it is too late for him to go into chancery. 3 Ves., 170.

The complainant should have made his election without waiting for future developments. It is not a statutory bar that interposes, but acquiescence.

(Mr. *Ewing* here went into calculations to show the value of the property then, and until 1832.)

Up to the issuing of the patents in 1830, the value of the property did not change. Suppose this bill had been filed in 1832. No chancellor could have acted on the future use which Oliver might make of the property. But that further use, and the enhanced value of the property, blends itself everywhere with the opinion of the court below, and is made to give a character to past transactions.

1st. There is an impression that the tracts purchased under the mortgage and the attachment were of great value; but, according to the evidence, the whole property, at any time from 1822 to 1830, was not worth, in cash, $1,200.

2d. In making Oliver's exchange with the Michigan University re-act upon and affect his purchase of the other tracts.

3d. It fixes upon Oliver a knowledge of the contingent future. The bill to foreclose and the attachment were in 1825, and it is supposed that Oliver's design in acquiring the other tracts was to repossess 1 and 2; but at that time 1 *395] and 2 belonged to the United States, and there was no prospect that any thing but money would *ever purchase them. The university did not select until June 25th, 1827.

7. Oliver's agency after the relinquishment.

At Baum's request he paid with his own money debts of the Port Lawrence Company; and the vouchers show great accuracy and strict justice. Did this disable him from recovering the money so paid?

8. Agreement to re-purchase.

The evidence shows an intention on the part of Baum to re-purchase, but there was no contract or understanding to that effect. Nor does any evidence show how he proposed to carry out his design, whether with his own money or a fund raised by contribution.

9. Suppose Baum had purchased and paid his money, would the members of the Port Lawrence Company have been bound to contribute? or would any trust have resulted to them? or if Piatt had made the purchase, could Baum have held any part of the property? Neither of the parties ought to have purchased for the benefit of their old partners. There would have been absent persons, insolvent estates, infants, femes covert, all to unite in the expenses and incur the hazard of what counsel would have called a reckless and extravagant expenditure to build up a city. The purchase required capacity, consent, contribution, and also situation and ability, to

join in its management. The negotiation with the United States entirely failed.

10. The exchange for 1 and 2, and resulting trust.

It is contended that a trust results to the Port Lawrence Company on two grounds:

1st. That the purchase was for Baum and his associates, who were the Port Lawrence Company. This is charged in the bill and denied in the answer; and the record shows that Oliver is sometimes spoken of, in the records of the university, as acting for himself, and sometimes for others. It was probably an error of Mr. Wing, and corrected by Oliver as soon as discovered.

2d. That a trust resulted, because the sale on the attachment passed no title to Oliver, and therefore the quarter-sections still belonged to the Piatt Company; and because the sale under the mortgage passed no title except that of Baum himself, therefore, with that exception, the tracts 3 and 4 belonged to the Port Lawrence Company; and that Oliver having exchanged 3 and 4 and the quarter-sections for 1 and 2, a trust results therein to the Port Lawrence Company, and to the Piatt Company.

But a member of the Port Lawrence Company has joined with a member of the Piatt Company, and filed this bill. That the partners in the different companies happen to be the same individuals, does not help the case; it is a joinder of different claims in the same bill, which becomes multifarious. If so, the difficulty lies deeper than mere pleading; for without such joinder the party cannot *pre- [*396
sent this multifarious case. No such case has ever been sustained. If there had been an agreement between these two companies that their land should be so exchanged, and they had vested the title in Oliver for the purpose, the bill would lie. But there was no such agreement, and no trust assumed on the part of Oliver. He purchased the two tracts of land at judicial sales, was in possession, claimed title, and made the exchange for himself. The books, we believe, show no case in which the separate funds of several individuals can be followed into a joint investment, so as to raise a trust in the property. (See the authorities referred to by Mr. *Stanberry*.)

The vast enhancement of the value of the fund with which 1 and 2 were purchased, by applying to it the labor and skill of Oliver and Williams; the time, and efforts, and skill of Oliver, in bringing about the exchange, should be considered as a fund which helped to pay for 1 and 2 as fully as so much cash. The property has thus been made to be worth more than an hundred fold as much as it was at the time of the

exchange. And this is all to be restored if the court hold both, or either of the parties claiming, to be entitled to it.

11. Estoppel.

Baum conveyed the lands included in the mortgage to Oliver, with covenants of warranty. Assets descended to his heirs, who are estopped. Co. Litt., 325.

12. Williams is a *bona fide* purchaser without notice.

(See this head discussed at the concludion of Mr. *Stanberry's* argument.)

Mr. Justice STORY delivered the opinion of the court.

This is the case of an appeal from the decree of the Circuit Court of the district of Ohio, sitting in equity,—rendered in favor of the original plaintiff, and it is brought to this court by the original defendants, who are now the appellants. The record is exceedingly voluminous, and the facts and proceedings complicated and perplexed by a variety of details. A general outline of the leading facts is given in the printed opinion of the court below, with which we have been favored; and those facts cannot be more succinctly stated than they are in that summary—we shall therefore avail ourselves of it upon the present occasion. It is as follows: "In the summer of 1817, the complainant, in connection with John H. Piatt, William M. Worthington, and Gorham A. Worth, formed an association to purchase lands of the United States, at a public sale, which was shortly to take place at Wooster, in this state —and the complainant was appointed the agent of the company, to attend the sale for that purpose.

"Another association consisting of Martin Baum, Jesse *397] Hunt, Jacob Burnet, William C. Schenck, William Barr, William Oliver, *and Andrew Mack, was formed for the same object—and William Oliver and William C. Schenck were appointed its agents to attend the sale.

"Before the sale took place, it was discovered that both companies were desirous of purchasing the same tracts of land, and the agents agreed that they would purchase tracts 1, 2, 3, and 4, at, and including the mouth of Swan creek, in the United States reserve, at the foot of the rapids of the Miami; and also Nos. 86 and 87 on the other side of the river, opposite the mouth of Swan creek, for the joint benefit of both companies; each company to have one-half of the lands purchased, and to pay at the same rate. Nos. 86 and 87 were bid off by Oliver, and the certificates of purchase issued to him. The other tracts were bid off by the complainant, and the certificates of purchase were issued in the names of the association represented by him.

"At the same sale, the complainant, in behalf of his company, purchased the north-west quarter of section 2, township 8, the south-west quarter of the same section, the north-west quarter of section 3, township 3, and also the south-east and south-west quarters of the same section, in said reserve; and one-fourth of the purchase money on each tract being paid, certificates of purchase were made out in the names of the company. And the other agents purchased for their company, at the same sale, other tracts of land.

"On the return of the agents to Cincinnati, their acts were ratified by both companies. One company was designated the Piatt Company, the other the Baum Company; and the union of both, in regard to the lands jointly purchased, was called the Port Lawrence Company. The joint, or Port Lawrence Company, having made their purchase with a view of laying out a town, to be called Port Lawrence, appointed Baum a trustee, and authorized him to sell lots, and do other things in relation to his agency, for the benefit of the company.

"On the 14th August, 1817, Baum appointed Oliver his attorney, to sell lots in the town to be laid out, receive the money, and give certificates of sale, in the nature of title-bonds, to the purchasers; and he, in association with William C. Schenck, was authorized to lay out the town. Baum, and and also the proprietors, gave to Oliver a letter of instructions in relation to the plan of the town, the sale of the lots, &c. By the conditions of sale, one-fourth of the purchase money was to be paid down, and the residue in three equal annual payments.

"At the sale of lots, the sum of $855.33 was received by Schenck, for which he was to become accountable to Baum.

"At the sale, Oliver purchased lots 223 and 224, an undivided half of which he afterwards conveyed to Baum, and they erected a warehouse and other improvements on them.

*"In August, 1818, he sold one-half of his interest [*398
in the Port Lawrence Company to William Steele and William Lytle; and in March, 1819, he sold the residue of his interest to Micajah T. Williams, one of the defendants, and his partner Embre.

"By the reduction of the price of the public lands, and the pressure of the times, the Port Lawrence Company were under the necessity of relinquishing to the United States tracts 1 and 2, having agreed to pay for the same about $20,000; and of appropriating the money paid on them to the payment in full of the residue of the tracts purchased by them, and by the Baum and Piatt Companies respectively. In pursuance of this object, the five quarter-sections purchased

by the Piatt Company were assigned to Baum, the 17th September, 1821; and on the same day, tracts numbered 1, 2, 86, and 87, purchased in the name of the Piatt Company for the Port Lawrence Company; and also tracts 3 and 4, purchased by Oliver for the same company, were assigned to Baum. It is alleged that these tracts had been previously assigned to Baum, of which there is no evidence.

"On the 27th September, 1821, Baum, through his agent, Micajah T. Williams, one of the defendants, relinquished to the United States, tracts 1 and 2. On these tracts there had been paid the sum of $4817.55: $1372.34 of this sum were applied to complete the payments on tracts 3, 4, 86, and 87, the residue of the tracts purchased at the sale by the Port Lawrence Company. From the relinquished tracts, there still remained $3445.21. Of this sum, one-half belonged to the Piatt Company: $1248 were applied to complete the payment on the five quarter-sections, which left a balance of $474.60 still due to the Piatt Company; but which was applied in payment of lands held by the Baum Company.

"After the relinquishment of the tracts on which the town had been laid out, the purchasers of town lots claimed a return of the money paid by them, with interest, and also damages for their improvements.

"On the 10th September, 1822, Baum gave to Oliver a certificate, which stated there was due him, by the Port Lawrence Company, the sum of $213.02, which he refunded to purchasers of lots, by the request of the company, 'it being the amount due on the shares originally owned by John H. Piatt, Robert Piatt, G. A. Worth, and William M. Worthington.'

"And on the 27th August, 1823, Oliver having made out an account against the Port Lawrence Company, for money paid by him to purchasers of lots, and services rendered as agent, Baum admitted his account, amounting to the sum of $1835.47; to secure the payment of which, Baum executed to him a mortgage on tracts 3, 4, 86, and 87. The payment was to be made, with interest, on or before the 1st of January, 1824.

*399] "The 7th October, 1825, Oliver caused an attachment to be *issued by the clerk of Monroe county, in the Michigan Territory, against Baum and the members of the Piatt Company, on the certificate of indebtment given by Baum. This attachment was levied on four of the five quarter-sections owned by the Piatt Company, and such proceedings were had on the attachment, as to obtain an order of sale of the property attached; three of the quarters were sold, by

the auditors appointed, for the sum of $241.60, to Noble, the agent of Oliver. Noble, shortly afterwards, conveyed these tracts to his principal.

"A bill to foreclose the mortgage given to Oliver was filed by him in the Supreme Court of Michigan, the 13th of October, 1825. And a final decree having been obtained, the mortgaged premises were sold, by the assistant register of the chancery court, to Oliver, the 1st September, 1828, for $618.56.

"By the act of 20th May, 1826, the Secretary of the Treasury was authorized to select, for the benefit of the University of the Michigan Territory, a certain number of acres of the public lands within the territory, and he selected tracts 1 and 2, which had been relinquished.

"In the summer of 1828, as appears from the report of the committee of the trustees of the university, Oliver, as the agent of Baum and others, proposed to exchange certain lands owned by Baum, in the vicinity of Port Lawrence, or any of the public lands subject to entry, for tracts 1 and 2, on which the town of Port Lawrence had been laid out.

"A law of Congress was passed, authorizing the exchange, the 13th January, 1830. Previous to this, Baum assigned to Oliver the final certificates for the tracts he purchased under the attachment, and also under the decree of foreclosure; and one of the quarter-sections levied on by the attachment, but not sold under it, in payment of the balance of the judgment on the attachment, which enabled Oliver to obtain patents for the same in his own name. And on his conveying to the university tracts numbered 3 and 4, except ten acres reserved of number 3, and the north-west quarter of section 2, township 3, and also the north-west and south-west quarters of section 3, township 3, he received an assignment from the university of their right to tracts 1 and 2, for which patents were issued in the name of Oliver.

"After the exchange was effected, Baum, and the defendant Williams, each purchased an interest of one-third in tracts 1 and 2, 86, and 87. After Baum's death, in 1832, Oliver purchased his interest from his heirs. And the 1st December, 1832, Oliver conveyed to Williams an undivided half of the ten acres reserved in number 3. On the 23d May, 1834, he conveyed to him an undivided half of tracts 86 and 87, except sixty acres which had been sold to Prentiss and Tromley; and on the —— day of November, he conveyed to him 'one undivided half of lots 1 and 2, on which Port Lawrence was laid out,' together 'with a like interest in all sales and improvements thereunto belonging.'

*"Oliver, Baum, and Williams, agreed to lay out the town of Toledo on the site of Port Lawrence, and to make titles to the Port Lawrence purchasers of lots, on their complying with their contracts.

"Some years after this, Oliver purchased from the Michigan University the tracts of land he conveyed to it in exchange for tracts 1 and 2.

"Of the Piatt Company, John H. Piatt is deceased, and his administrators and heirs are made parties to this suit. William M. Worthington assigned one-half his interest in the Port Lawrence Company, and it is claimed and represented by John E. Worthington. The interest of Worth has been assigned to the defendant Ewing, who also claims the entire interest of Baum, Mack, Barr, Burnet, and half the interest of the complainant.

"Of the Baum Company, Martin Baum, Jesse Hunt, William C. Schenck, and William Barr, are deceased."

Such is a general outline of the leading facts. There are others which may be required to be adverted to in the progress of this opinion; but there are many details which must necessarily be passed over in silence, as they would tend to embarrass the discussion of the main questions in the cause, and obscure rather than illustrate the merits thereof.

The object of the bill is to subject the tracts No. 1 and No. 2, now constituting the site of the town of Toledo, formerly known as Port Lawrence, to the rights of the Port Lawrence Company, composed, as we have seen, of the Piatt Company and the Baum Company, and those who claim under them, now in the possession of Oliver and Williams, under a title derived from the grant of the Michigan University, upon the ground that a trust has attached to those tracts in favor of the Piatt and Port Lawrence Companies, under the circumstances which will be presently stated. These circumstances are, that the lands given in exchange to the Michigan University, for tracts No. 1 and No. 2, under the negotiation with the university, were, at the time, the property of the Piatt and Port Lawrence Companies, as *cestuis que trust* thereof; that the facts were at the time well known to Baum, and Oliver, and Williams, and consequently that the trust by operation of law attached thereto in the hands of those parties.[1] To this conclusion several objections have been taken by the counsel for the appellants. In the first place, that no such trust attached to the lands so given in exchange to the Michigan University, at the time of the transfer, and consequently none

[1] CITED. *Doe* v. *Eslava*, 9 How., 447.

to tracts Nos. 1 and 2, taken in the exchange. In the second place, that if it did, as Oliver afterwards re-purchased the exchanged lands from the university, and Oliver and Williams under him now hold some parts thereof, the trust is revived, and has re-attached *to these lands, and thus [*401 has displaced any supposed trust upon tracts No. 1 and No. 2, at least *pro tanto*. In the next place, that Oliver and Williams are purchasers without notice of the trust, or of any misapplication of the trust property by the trustee.

Before proceeding to the considerations applicable to the first and third points, it may be well to dispose of that which grows out of the second point, as it involves a most important principle in equity jurisprudence. It is a clearly established principle in that jurisprudence, that whenever the trustee has been guilty of a breach of the trust, and has transferred the property, by sale or otherwise, to any third person, the *cestui que trust* has a full right to follow such property into the hands of such third person, unless he stands in the predicament of a *bona fide* purchaser, for a valuable consideration, without notice. And if the trustee has invested the trust property, or its proceeds, in any other property into which it can be distinctly traced, the *cestui que trust* has his election either to follow the same into the new investment, or to hold the trustee personally liable for the breach of the trust. This right or option of the *cestui que trust* is one which positively and exclusively belongs to him, and it is not in the power of the trustee to deprive him of it by any subsequent re-purchase of the trust property, although in the latter case the *cestui que trust* may, if he pleases, avail himself of his own right, and take back and hold the trust property upon the original trust; but he is not compellable so to do. The reason is, that this would enable the trustee to avail himself of his own wrong; and if he had made a profitable investment of the trust fund, to appropriate the profit to his own benefit, and by a re-purchase of the trust fund to charge the loss or deterioration in value, if any such there had been, in the mean time, to the account of the *cestui que trust*—whereas the rule in equity is, that all the gain made by the trustee, by a wrongful appropriation of the trust fund, shall go to the *cestui que trust*, and all the losses shall be borne by the trustee himself. The option, in such case, to take the new or the original fund is, therefore, (as has been already suggested,) exclusively given to the *cestui que trust*, and is given to him for the wisest purposes and upon the soundest public policy. It is to aid in the maintenance of right and in the suppression of meditated wrong. Many cases on this subject will be found collected in the ele-

mentary writers. (See 2 Sugden on Vendors, chap. 14, § 8, p. 148, &c., 9th edit.; 2 Story Eq. Jurisp., § 1258 to § 1265, 3d edit.; Com. Dig. Chancery, 4 W. 25, to 4 W. 28;) and the rule will be found fully discussed and recognized in *Ryall* v. *Ryall*, 1 Atk., 59; *Lane* v. *Dighton*, Amb., 409; *Lench* v. *Lench*, 10 Ves., 511; and *Docker* v. *Somes*, 2 Myl. & K., 655; in many of its important bearings. Lord Ellenborough, in the case of *Taylor* v. *Plumer*, 3 Man. & S., 562, examined and confirmed the doctrine in its application to cases at law, and cited and approved the decisions in equity; so that it is plain upon authority, and the *same would be equally true upon principle, that if the tracts Nos. 1 and 2 were purchased with the trust fund belonging to the Piatt and Port Lawrence Companies, the latter are at full liberty to follow the same into the hands of any persons not being *bona fide* purchasers for a valuable consideration without notice, and the circumstance that there has since been a re-purchase of the original trust property by Oliver, does not in any manner affect, or control, or vary, the right or option of the *cestuis que trust*. The case is not like that put at the bar, where a part of the funds of the *cestuis que trust* have been mixed up with other funds exclusively belonging to the trustee in the new purchase or investment. In such a case there may be ground to hold the trust funds in charge *pro tanto* therein. Here, the whole consideration of the purchase was a fund wholly and exclusively belonging to the *cestuis que trust*, if they have made out any title at all, which we shall hereafter consider.

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Let us then proceed to the consideration of the other questions above stated. And the first is, whether at the time of the exchange with the Michigan University, the lands given in exchange for tracts Nos. 1 and 2, were, in the hands of the party or parties making that exchange, affected with any trust such as has been already suggested? And this leads us to the consideration of the antecedent state of facts between the parties to this record.

We have seen that the original purchase of tracts Nos. 1, 2, 3, and 4, and Nos. 86 and 87, was made for the account and benefit of the Port Lawrence Company; and the object of the purchase was to lay out a town thereon, and to sell the lots to purchasers. Baum was appointed a trustee and agent for this purpose, and he was to make sale of the lots and conduct the other affairs of the agency. With the consent of the company, in August, 1817, he employed Oliver as a sub-agent, who received instructions from the company in relation to the plan of the town (which he was to lay out in conjunction with Wm. C. Schenck) and the sale of the lots. This agency

of Oliver, under Baum, was originally (as it should seem) limited to one year, but it was certainly continued, if not for all, at least for some purposes, to a much later period. In August, 1818, Oliver sold one-half of his interest in the Port Lawrence Company to Steele and Lytle, and in March, 1819, he sold the residue to the defendant Williams, and his partner Embre. And these facts are most important to be borne in mind, since they clearly establish that Oliver, as an original proprietor, and Williams, as a derivative proprietor, under Oliver, in the Port Lawrence Company, had full and complete notice of the nature and objects of the original purchase by that company, and of the trust and agency of Baum in accomplishing those objects. In truth, the laying out of a town on those tracts, and the sale of the lots, seems to have been an enterprise always cherished by some of the company with uncommon solicitude and sanguine expectations of profit.

*In consequence of the reduction of the price of the public lands by Congress, and the pressure of the times, [*403 the Port Lawrence Company found themselves compelled, in 1821, to relinquish a part of their tracts to the government. For this purpose they assigned all the four tracts to Baum, in September, 1821; and the Piatt Company at the same time assigned to Baum their five quarter-sections; and he, through the defendant, Williams, thereupon relinquished tracts Nos. 1 and 2, to the United States, and the return purchase money was applied *pro tanto* to complete the payments due on the other tracts, (Nos. 3 and 4, and Nos. 86 and 87,) and the residue was applied partly to pay the balance due on the five quarter-sections, purchased by the Piatt Company, and partly to pay a balance due on other lands purchased by the Baum Company.

Pausing here, for a moment, it is apparent that the original trust created in tracts Nos. 1 and 2, under the agency and assignment to Baum, for the benefit of the Port Lawrence Company, was, by this relinquishment to the government, entirely displaced and extinguished. These tracts afterwards, in the summer of 1828, under the act of 20th of May, 1826, were selected by the Secretary of the Treasury for the Michigan University, and certainly came into the possession of the latter discharged of the trust. Still, however, it is obvious from the papers in the cause, that in the intermediate time between the relinquishment of these tracts and the grant thereof to the university, the original plan of establishing a town on the site, remained a favorite project of Baum as agent of the Port Lawrence Company, and he made strenuous efforts by applications to Congress, and to the General Land-office, to

re-acquire the title thereof, not for himself alone, but, as his applications and letters show, on behalf of himself and his associates. He constantly held himself out as acting for the benefit of the concern; and there is every reason to suppose, that some, if not all, of his associates were lulled into security, and contemplated, if he should be successful, to resume the original plan. This may serve in some measure to explain their inactivity, and to show that they continued to place unlimited confidence in Baum, that all his proceedings would be for their benefit, and not for his own sole advantage. Baum petitioned Congress on the subject as early as January, 1822, and in his letter to Mr. Brown, (a senator in Congress,) of the 25th of December, 1822, enclosing a duplicate of his petition, he says: "Enclosed is the petition signed by myself only, still others have an interest in it;" and he names in the letter, and its postscript, Williams, Piatt, and others. In another letter to the same senator, dated the 6th of February, 1823, he says: "The tracts purchased by myself and associates in that quarter; those retained and relinquished can be ascertained in the Land-office." In another letter addressed to the commissioner of the General Land-office, as late as the 27th of July, 1827, he says: "In consequence of *404] the President's proclamation, announcing *the sales of lands, I attended, at Delaware, on the 9th instant, but was much disappointed to find there instructions of the General Land-office, to withhold from sale all lands situate north of the line which divided the state of Ohio and the Michigan Territory, for I went there for the express purpose of re-purchasing tracts Nos. 1 and 2, in the Maumee reservation, which I formerly owned and which I have relinquished." He adds: "These lands, though bought in sundry persons' names, were afterwards transferred to me as agent for the purpose of managing and conveying them in case of sales." In the same letter he protests against the trustees of the Michigan University having a grant of these tracts, as they have no claim to the same, and that he has a strong claim upon the government.

To repel the inferences deducible from these facts, it is said, that the testimony of Carneal establishes that Piatt attended that very sale at Delaware for the purpose of buying these tracts, not for the Port Lawrence Company, but for another company consisting of Colston, Carneal, and himself; and that Baum also attended on his own account, and not for the Port Lawrence Company. Of transactions of this nature, after such a lapse of time, it is perhaps not easy to ascertain all the facts which then regulated the conduct of the parties,

when they depend upon the frail recollections of witnesses. It is quite possible that the circumstances might have been explained, and nothing have been intended by either party really injurious to the interests of the Port Lawrence Company. But as no sale took place of these tracts upon that occasion, the only effect which can be properly attributed to the testimony, admitting it in its fullest latitude, is, that it weakens our confidence in Piatt's own conduct, and diminishes the force of the inference as to Baum's then acting as an agent for the Port Lawrence Company. But the written statements of Baum in the letters above cited are evidence of his intentions and acts, of a far higher character, which the lapse of time has not obscured or varied, and those letters are, as to himself, most conclusive to show, that he did not deem himself as acting for his own interest alone, but for that of his associates also, in his whole proceedings to re-acquire those tracts.

As soon as the Michigan University had obtained a title to tracts Nos. 1 and 2, (in the summer of 1828,) Oliver, avowedly on behalf of Baum, made an application to the trustees of that university for an exchange of those tracts for other tracts in the vicinity. These negotiations were begun as early as the 12th of August, 1828, and various propositions were made and negotiations were had by the trustees and Oliver, as agent of Baum, between that time and the 4th of January, 1831, when the consent of Congress having been obtained for the exchange, by an act approved on the 13th of January, 1830, the university agreed to make the exchange: and accordingly, by their deed, dated the 7th day of February, 1803, did *convey their right and title to tracts Nos. 1 and 2 to Oliver in fee-simple, in consideration of receiving [*405 a deed from Oliver of certain tracts, containing seven hundred and sixty-seven and a half acres, viz.: the whole of tracts Nos. 3 and 4, the south-west quarter of section 2, and the west half of section 3; the tracts being part of the purchase of the Port Lawrence Company, and the quarter and half sections being part of the purchase of the Piatt Company, in 1817. We thus trace the trust property home to the Michigan University, as obtained by a conveyance from and under Baum and Oliver in pursuance of a negotiation, avowedly made by Oliver on behalf and as agent of Baum, as the sole consideration of the grant of Nos. 1 and 2 to Oliver by the university.

And this conducts us to the consideration of that which is the main hinge on which the present case turns; that is, whether the tracts, so conveyed by Oliver to the university,

were at the time affected with the trust in favor of the Piatt and Port Lawrence Companies, with which they were originally chargeable in the hands of Baum. This necessarily involves a review of the title of Oliver to the tracts (the three quarter-sections) belonging to the Piatt Company under the attachment proceedings in Michigan, and also of his title under the mortgage of tracts Nos. 3 and 4, and Nos. 86 and 87, belonging to the Port Lawrence Company, and the foreclosure thereof,—in connection with the subsequent acts of Baum and Oliver in the premises. Unless the title thus derived is beyond all legal exception (*omni exceptione major*) as an adverse and unimpeachable title, it is plain, that the original trust attached at the time of the exchange to the tracts so conveyed, and consequently (as has been already suggested) it was, at the option of the *cestuis que trust*, transferable and transferred to tracts Nos. 1 and 2. For it is in our judgment beyond all question, that Oliver at the time of the exchange had full notice of the trust and title originally invested in Baum, and that his acts in making the exchange are to be deemed the acts of Baum, and affected by the same considerations as if personally transacted by Baum himself, and were designed by mutual consent to promote the contemplated objects and interests of both.

And, first, let us review the procedings under the attachment. In September, 1822, Baum gave a certificate to Oliver, stating that a debt of $213.02 was due to him from the Port Lawrence Company for money refunded to purchasers of lots at the request of the company, "it being the amount due on the shares originally owned by John H. Piatt, Robert Piatt, G. A. Worth, and Wm. M. Worthington." These persons constituted the Piatt Company; and consequently the claim thus asserted was a sub-division of a debt confessedly due from the Port Lawrence Company, in which the Piatt Company had a moiety of the interest only. Whether Baum had, in virtue of his general agency, the right to give such a certificate, thus severing a joint debt, so as to be binding upon the Piatt Company, *alone, without their consent, and whether this certificate was *bona fide* given under justifiable circumstances, it is unnecessary to consider, although the transaction is certainly open to some observation in point of authority as well as propriety in the then unliquidated concerns of the Port Lawrence Company. Assuming, however, the transaction to have been perfectly correct and binding in all respects, let us examine the subsequent proceedings consequent thereon. Upon this certificate Oliver, in October, 1823, instituted a suit by attachment in Monroe county, in the territory of

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Michigan, against Baum, Robert Piatt, G. A. Worth, and William Worthington, (John H. Piatt being then deceased,) alleging them to be joint partners and survivors, and all residing out of the territory—upon which four of the quarter-sections of land owned by the Piatt Company in that county were attached. At the October term, 1826, of the same court, judgment was obtained by default against all the defendants, no appearance having been entered for them; and upon the execution issuing thereon, three of the four sections (those which were afterwards conveyed to the Michigan University) were sold, and bid off by an agent of Oliver, and were afterwards conveyed by him to Oliver. Of this suit there is no pretence to say, that any of the defendants, except Baum, had any notice, if indeed he had any, although some of them resided in the same state where Oliver resided, and one of them in a neighboring state, at no great distance, who was known to be a man of large property. The other members of the Port Lawrence Company were not made parties to the suit. It was brought in a distant territory, almost then a wilderness, more than two hundred miles from the residence of the defendants; and if it had been the design of Oliver to procure a judgment against the parties, without any notice to them, which should be obligatory upon them, and to give Oliver a good title to the lands at a comparatively trivial price, better means could scarcely have been devised to accomplish the purpose. For the institution and consummation of this suit behind the backs and without the knowledge of the parties in interest, no better excuse can now be found than that Oliver did not choose to institute a suit against them at home, as it might give them offence and break up some former ties of acquaintance. How far such an excuse is admissible we do not stop to inquire. It rather tends to cast a shade upon the transaction than to vindicate it. But what was the title thus acquired, supposing all the proceedings to be *bona fide?* It was a mere naked title in equity to the tracts, the title to which still remained in the United States; and the legal title could not be consummated, unless the certificates of the purchase and payments for the tracts were first surrendered to the United States. Those certificates were then in the hands of Baum, as trustee of the Piatt Company; and he had no right under the circumstances to assign or surrender those certificates to Oliver to enable him to make his title available at law, without the express consent *of the Piatt Company. If he had refused, Oliver could not have obtained them, unless upon a bill in equity to which all the proprietors should be made parties, and in which they would [*407

have been at full liberty to examine into the validity and merits of the original claim of Oliver, on which his attachment was founded, and also into the regularity and *bona fides* of the transactions in and under the suit. Yet Baum, in December, 1828, assigned and surrendered up these certificates to Oliver, and thus enabled him to consummate his title and reduce it to a legal title, by obtaining a patent, without any such consent; and in so doing he was guilty of a manifest breach of trust, of which Oliver cannot now be permitted to pretend ignorance. It is also a fact of no small significance, that the surrender of these certificates was contemporaneous with the surrender to Oliver of the certificates of tracts Nos. 3 and 4; and subsequently, in December, 1829, a like surrender of Nos. 86 and 87, belonging to the Port Lawrence Company, under the foreclosure of the mortgage, which we shall have occasion to review; and that all this was done pending the negotiations with the Michigan University by Oliver on behalf of Baum for the exchange.

This view of the matter releases us from no small doubt and difficulty in relation to an argument pressed at the bar with great earnestness; and that is, whether such an equity was attachable and vendible under the attachment law of Michigan. There is great difficulty in maintaining the affirmative, for the reasons stated in the opinion of the learned judge in the court below; and especially if, as has been suggested, the act is but a transcript of an act of New Jersey, and the courts of that state have, as has been asserted at the bar, held no such equity attachable.

Then, as to the mortgage and the proceedings under it. The mortgage was given upon tracts Nos. 3 and 4, and Nos. 86 and 87, by Baum to Oliver, in August, 1823, upon an account then adjusted between him and Oliver against the Port Lawrence Company (and which does not appear ever to have been examined or sanctioned by the company itself) for a balance of $1,835.47, then supposed to be due to him for money paid and services rendered by him as agent of the company. In October, 1825, a bill was filed in the Supreme Court of Michigan (within which these tracts were situate) to foreclose the mortgage; and such proceedings were had upon this suit, that, in September, 1828, the tracts were sold, and at the sale bought by Oliver for the sum of $618.56, and a deed of conveyance thereof was accordingly made to him. To this suit Baum alone was made a party; none of the other proprietors of the Port Lawrence Company being made parties, although Oliver knew perfectly well who they were, and that Baum was merely their trustee, and that they were the *cestuis*

que trust, possessing the beneficial interest in the premises. Under such circumstances, to allow the foreclosure to stand, so as to conclude the rights of the *cestuis que trust*, would be a violation of *all the doctrines of courts of equity upon this subject. The decree must be treated, as to them, as wholly inoperative and void. [*408

But there is another view of the matter, which is conclusive. The mortgage was of a mere equity, the legal title being still outstanding in the United States; and supposing that this equity could have been foreclosed in such a suit, (which, considering the defect of the real parties in interest, it clearly could not,) still it was a naked equity, which could be made available to obtain a legal title from the United States, only by an assignment and surrender of the certificates of the purchase and payments, then held by Baum for the benefit and use of the Port Lawrence Company. And here, again, the same considerations apply, which have been already suggested. Oliver could not obtain an assignment and surrender of those certificates, except by a bill in equity against Baum to which the other proprietors in the Port Lawrence Company must have been made parties, as they were necessary parties; and thus the whole merit of the mortgage and foreclosure must have been brought directly before the court for adjudication. Yet Baum, without any consultation with or assent of those proprietors, assigned and surrendered the certificates of those tracts also to Oliver, and thus enabled him to obtain a patent therefor from the United States, in subversion of their rights and his duty. This was a gross breach of trust, and was done (let it be repeated) in December, 1828 and 1829, pending the negotiations with the Michigan University, obviously for the purpose of enabling Oliver in his, Baum's, name, and on his behalf, to consummate the exchange. And, finally, when the negotiation was consummated by means of these very certificates, Oliver, with the consent of Baum, was enabled to obtain a patent therefor, on the 4th of March, 1831.

Very soon after the patent was so obtained, viz., on the 16th of May, 1831, we find that Baum, Oliver, and Williams, entered into a written agreement, by which Oliver purported to sell, in fee-simple, to Baum and Williams, each one-third part of the tracts Nos. 1 and 2, and Nos. 86 and 87, with the exception of sixty acres out of No. 86; and they were to receive a quit-claim deed therefor from him accordingly, for the sum of $1,555 for each third part. The parties farther agreed to lay out a town upon the old site, with some change of the plan, and to bring the lots into the market for sale;

and they were to contribute to the charges and expenses according to their respective interests. After the death of Baum, Oliver purchased his share of the tracts from his heirs; and by certain deeds of quit-claim, executed in December, 1832, in May, 1834, and in November, 1834, Oliver conveyed one-half of the premises to Williams.

Now, looking at these transactions together, it seems almost impossible to escape from the conclusion, that Baum and Oliver had a mutual interest in the negotiation with the Michigan University; that it was not only carried on in the *409] name of Baum, and apparently for his account, but that Oliver acted as his agent throughout; that the *deed from the university was made directly to Oliver, with the consent of Baum; that the assignment and surrender of all the certificates by Baum to Oliver, was for the express purpose of enabling Oliver to complete the bargain with the university; and that the agreement between Baum, Oliver, and Williams, which followed almost immediately upon the grant of the patent, was made in pursuance of a prior understanding between all the parties, and was but a consummation of the objects originally contemplated by Baum and Oliver, from the period of their first negotiation with the university down to the time of the execution of that agreement. And all this was done by Baum and Oliver, without the knowledge, or consent, or approbation, of the Piatt and Port Lawrence Companies, and was never sanctioned by them. Under such circumstances, what is the true duty of a court of equity? It is, to hold the parties engaged in these transactions, with full notice of the title and the trust in Baum, bound by that trust, and to enforce that trust against the tracts Nos. 1 and 2, so far as they remain in their hands unaffected by the rights of purchasers under them, *bona fide* for a valuable consideration, without notice. In our judgment, no reasoning can make the proposition more clear than a simple recital of the facts, and the statement of the general doctrine of equity jurisprudence that the *cestuis que trust* have an option to follow their property, or its proceeds, into any other property into which it has been converted by a breach of the trust, subject only to the rights of such purchasers as have been just referred to. Indeed, the question, as against Baum and Oliver, seems absolutely closed by the state of the evidence; and their intimate knowledge of the whole concern requires neither illustration nor commentary.

Let us, then, proceed to the consideration of the case as to Williams. It is said that he stands in the predicament of a *bona fide* purchaser for a valuable consideration, without

notice; and if he does, he is certainly entitled to protection. Williams, in his answer, asserts himself to be such a purchaser, but it is difficult to maintain that averment in its just legal sense, looking to all the circumstances of the case. In 1819, he became a purchaser of one-half of the interest of Oliver in the Port Lawrence Company, and, as such, he could not fail to know that tracts Nos. 1 and 2, 3 and 4, and Nos. 86 and 87, belonged to that company; and he has never ceased to be a member of that company. In 1821, he was employed by Baum, the acknowledged trustee and agent of the company, to surrender tracts Nos. 1 and 2 to the government of the United States; and through him the relinquishment took place. He says that he did not know of the negotiation between Oliver and the university, for an exchange of the lands, until after its consummation, and never heard of the details of said negotiations, nor what lands were given in exchange, except parts of tracts Nos. 3 and 4. Now, these very tracts belonged to the Port Lawrence Company, so that he was [*410 necessarily *put upon the inquiry by what means Baum had parted with them, and Oliver had become possessed of them. Besides, in his negotiation and surrender of tracts Nos. 1 and 2 to the government, and the apportionment of the funds arising from the relinquished lands, first to the remaining lands of the Port Lawrence Company, and then to the lands respectively purchased by the Piatt and Baum Companies, he necessarily became acquainted with the relative interests of all these companies therein. The origin and title of the Michigan University to the tracts Nos. 1 and 2, and the exchange thereof with Oliver, were matters of public notoriety, and proclaimed in the acts of Congress under which the exchange was made. The deed from the university to Oliver recited the material facts respecting the lands given in exchange, and referred to the records of the antecedent negotiations; and the patent itself, from the government, of tracts Nos. 1 and 2, referred to the deed of Oliver to the university, of the lands given in exchange; so that it is most manifest that Williams, as a proprietor in the Port Lawrence Company, and as agent thereof in the relinquishment above referred to, and as a purchaser under Oliver, not only had the most ample means of knowing the nature and character and extent of the title of Oliver to the lands under consideration, but he was positively put upon inquiry in relation to the whole matter. If, under such circumstances, he chose to remain in indolent ignorance or indifference to the title, it was a voluntary ignorance and indifference, which ought not to be permitted to avail him against the rights of the *cestuis que trust*. If we add

to this the fact that within two months after the patent was obtained by Oliver, he and Baum united in an agreement with Oliver, by which each was to take a third part in the tracts Nos. 1 and 2, and Nos. 86 and 87, (these tracts never having been relinquished by the Port Lawrence Company to the government,) to be laid out as a town, and the lots sold on joint account, it would seem almost incredible that he should not have made some inquiries on the subject. And the only reasonable conclusion seems to be, that he was in as full possession of all the facts as were his partners Oliver and Baum. Another significant circumstance is, that this very agreement contained a stipulation that Oliver should give a quit-claim deed only for the tracts; and the subsequent deeds given by Oliver to him accordingly were drawn up without any covenants of warranty, except against persons claiming under Oliver, or his heirs and assigns. In legal effect, therefore, they did convey no more than Oliver's right, title, and interest, in the property; and under such circumstances, it is difficult to conceive how he can claim protection as a *bona fide* purchaser, for a valuable consideration, without notice, against any title paramount to that of Oliver, which attached itself as an unextinguished trust to the tracts.

And here, in our judgment, the merits of the case would seem to be brought to a close. But certain objections *411] have been made to *the right of the plaintiff to maintain the bill upon other collateral grounds. In the court below an objection was taken, by way of plea, that the original agreement of the Piatt and Baum companies, in regard to the purchases of these tracts at the public sale in 1817, was an illegal combination in fraud of the rights of the United States, and therefore it makes the whole purchase an utter nullity. This objection was fully answered in the opinion of the Circuit Court, in which, on this point, we fully concur. It has been abandoned by the learned counsel here; and, indeed, in our opinion, properly abandoned, as unmaintainable in point of fact as well as law.

Another objection is to the lapse of time. The mere lapse of time constitutes of itself no bar to the enforcement of a subsisting trust; and time begins to run against a trust only from the time when it is openly disavowed by the trustee, who insists upon an adverse right and interest, which is fully and unequivocally made known to the *cestui que trust*. Now, until 1831, no final overt act was done by Baum in violation of his duty as trustee; and the first and great breach of that duty, on his part, was the surrender of the certificates of the tracts to Oliver at different periods between 1828 and 1831.

At what particular period the subsequent acts of Baum, Oliver, and Williams, became first known to the plaintiff and the other proprietors of the Piatt and Port Lawrence companies having the same interest, does not distinctly appear; but the facts could not have been fully known or understood until within a few years before the filing of the bill, and at most probably not exceeding eight or ten. That period, upon admitted principles, is far too short to interpose any positive bar to relief in equity. There may have been an unjustifiable delay, and gross inattention on the part of some of the proprietors. But as against persons perfectly conusant of the trust it can furnish no ground for any denial of the relief which the case otherwise requires.

Another objection urged at the argument is, that the bill is multifarious in uniting the trust property owned by the Piatt Company and the Port Lawrence Company in one bill, as the interests of each are separate and distinct in the tracts conveyed by Oliver to the Michigan University. We are of opinion that the bill is in no just sense multifarious. It is true that it embraces the claims of both the companies; but their interests are so mixed up in all these transactions, that entire justice could scarcely be done, at least not conveniently done, without a union of the proprietors of both companies; and if they had not been joined, the bill would have been open to the opposite objection that all the proper parties were not before the court, so as to enable it to make a final and conclusive decree touching all their interests, several as well as joint. It was well observed by Lord Cottenham in *Campbell* v. *Mackay*, 1 Myl. & C., 608, and the same doctrine was affirmed in this court in *Gaines and wife* v. *Relf and Chew*, 2 How., 619, 642, that it is *impracticable to [*412 lay down any rule, as to what constitutes multifariousness, as an abstract proposition; that each case must depend upon its own circumstances; and much must necessarily be left, where the authorities leave it, to the sound discretion of the court.(a) But, if the objection were tenable, (as we are of opinion it is not,) it would be quite too late to insist upon it. The objection of multifariousness cannot, as a matter of right, be taken by the parties, except by demurrer, or plea or answer; and if not so taken, it is deemed to be waived. It cannot be insisted upon by the parties even at the hearing in the court below, although it may at any time be taken by the court *sua sponte*, wherever it is deemed by the court to be necessary or proper

(a) See also Story Eq. Pl. §§ 530—540, and the authorities there cited. *Attorney-General* v. *Cradock*, 3 Myl. & C., 85.

to assist it in the due administration of justice. And at so late a period as the hearing, so reluctant is the court to countenance the objection, that, if it can get on in the cause to a final decree without serious embarrassment, it will do so, disregarding the fault or error, when it has been acquiesced in by the parties up to that time. *A fortiori* an appellate court would scarcely entertain the objection, if it was not forced upon it by a moral necessity.[1] There is no pretence to say, that such is the predicament of the present cause in this court.

Another objection taken at the argument is, that Baum's heirs cannot insist upon any title to the property in question, because they are bound by the warranty of their ancestor in the conveyance thereof to Oliver. But this objection has no foundation whatsoever in law, whether the warranty be lineal or collateral; for the heirs here do not claim any title to the property by descent, but simply by purchase; and it is only to cases of descent that the doctrine of warranty applies. For this it is sufficient to cite Litt. sect. 735; Co. Litt. 365; Com. Dig. *Guaranty*, I, 2, and Bac. Abridgement, *Warranty*, G, H, I, L. The fact, therefore, that assets descended upon Mary P. Ewing, one of the children and heirs of Baum, can have no influence upon the right of her husband or herself to enter the land in controversy by purchase, however it might repel their right to take it by descent.

Another objection suggested at the argument was the difficulty of apportioning the respective interests of the *cestuis que trust*, in the tracts Nos. 1 and 2. But this difficulty has been overcome; and it constitutes no matter of difference between the Piatt and the Port Lawrence Companies, so far as their own interests are concerned, as distinguished from that of Oliver and Williams.

As to the report of the master and the exceptions thereto in the court below, although those exceptions were not formally overruled or allowed; yet it is plain that in the final decree *418] they were all disposed of, some being allowed and others disallowed; and no argument *has been addressed to us upon the present occasion, which points out any specific errors, which require correction beyond those which have been already incidentally hinted at.

We pass over some other objections, which were suggested at the argument, without remark, as this opinion has already been protracted to an unusual length. We need only say, that we see nothing in those objections which requires us to reform the decree of the court below.

[1] QUOTED. *Wade* v. *Pulsifer*, 54 Vt., 71.

Upon the whole, the decree of the Circuit Court is affirmed, with costs.

WASHINGTON BRIDGE COMPANY, APPELLANT, *v.* WILLIAM STEWART, JAMES STEWART, AND JOHN GLENN.

After a case has been decided upon its merits, and remanded to the court below, if it is again brought up on a second appeal, it is then too late to allege that the court had not jurisdiction to try the first appeal.[1]

The Supreme Court has no power to review its decisions, whether in a case at law or in equity. A final decree in chancery is as conclusive as a judgment at law.[2]

An affirmance by a divided court, either upon a writ of error or appeal, is conclusive upon the rights of the parties.

THIS was an appeal from the Circuit Court of the United States, for the District of Columbia, held in and for the county of Washington, sitting as a court of equity.

The same case was before the court at January term, 1840, and the decree of the court below affirmed by the Supreme Court, but in consequence of the court being equally divided, no opinion was given, and no report of the case published. It now came up on an allegation that it was improperly brought up before, as the decree, from which the appeal was taken, was said not to be a final decree.

The case was this:

The Washington Bridge Company were the owners of a bridge across the Potomac river, under a charter granted in 1808. In February, 1831, a large part of the bridge was broken up and carried away by the ice and flood; and in April, the president and directors called for an instalment of ten dollars per share from the stockholders, for the purpose of repairing it. The defendants in error did not pay, and their shares were forfeited on the 21st of June, 1832, under the 8th section of the charter.

On the 14th of July, 1832, Congress passed an act to purchase the bridge, and appropriated $20,000 for that pur-

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[1] FOLLOWED. *Whyte* v. *Gibbes*, 20 How., 542. CITED. *Bank of the United States* v. *Moss*, 6 How., 38; *Peck* v. *Sanderson*, 18 Id., 42; *Williams* v. *Bruffy*, 12 Otto, 255; s. c. 1 Morr. Tr., 414; *Holmes* v. *Oregon &c. R. R Co.*, 9 Fed. Rep., 238; s. c. 7 Sawy., 392; *Ogle* v. *Turpin*, 8 Bradw. (Ill.), 455; *Adams Co.* v. *B. & M. R. R. Co.*, 55 Iowa, 98. And see *Insurance Co.* v. *Boon*, 5 Otto, 143; *Renick* v. *Ludington*, 10 W. Va., 537, 540.

[2] FOLLOWED. *Noonan* v. *Bradley*, 12 Wall., 129; *Tyler* v. *Magwire*, 17 Id., 283. CITED. *French* v. *Hay* 22 Wall., 246.

pose, which they directed to be divided amongst the stockholders in the manner therein pointed out.

*414] In May, 1833, the defendants in error filed a bill in the Circuit *Court claiming to be stockholders, and, as such, to be entitled to a distributive share of the purchase money. The bridge company resisted the claim on the ground that their shares had been forfeited, and in November, 1838, the cause came on for hearing on the bill, answers, exhibits, depositions, and general replication, when the court made the following decree:

"This cause having been set for hearing upon the bill, answer, general replication, exhibits, and evidence, and coming on to be heard and argued by counsel, it is, on this twenty-ninth day of November, in the year eighteen hundred and thirty-eight, after full consideration, ordered, decreed, and adjudged, that the rights and interests of the complainants, and the other stockholders in said bill of complaint mentioned, and who have come in, or may come in, before the final determination of this cause, and procure themselves to be made parties to these proceedings, have not been, and were not, forfeited under and by virtue of the proceedings of said bridge company, stated and set forth in the said answer, and exhibits, and evidence, but that the same remain in full force and virtue, and that the said parties are respectively entitled to their proportion of the sum of $20,000, mentioned and stated in said bill of complaint as stockholders in said company; and that, in order to fix and adjust the said proportions or shares of said parties, there be first deducted the sum of $10,561.55, mentioned in said answer, being the sum advanced by certain stockholders, as therein mentioned, with interest thereon from the time the same was advanced to the time of the receipt of the said $20,000, being an average of nine months, for which said interest is to be calculated; also the sum of $568.25, being the amount of unclaimed dividends expended on the said bridge, with interest thereon from the time of said expenditure to the receipt of said $20,000, and that subject to such deductions; and, after the same shall have been made, the said complainants are respectively entitled to, and shall receive, their full share and proportion of the interest on the same, which shall have been earned and made of the said sums so due to them respectively pending this suit, under the investment made thereof by complainants.

"And it is ordered, that other items claimed to be deducted be rejected, no evidence having been offered to show their character or their amount.

"And it is further ordered, that the case be referred to the

auditor, to state an account in conformity with the principles laid down in this decree."

From this decree the bridge company prayed an appeal to the Supreme Court, where, as has already been stated, it was affirmed by a divided court.

In April, 1840, the case was referred by the Circuit Court to the auditor, who made the following report in November, 1841:

"The undersigned auditor, to whom was referred the papers in *this cause on the 29th of April, 1840, has had the same under examination, and, after a full consideration of the same, begs leave to make the following report: That the amount of funds in the hands of Frederick May, president and treasurer of the Washington Bridge Company, including interest on corporation stock received and to be received, on the 30th June, 1841, is $22,221.52. That the amount refunded the stockholders of fifteen hundred and nineteen shares, which they had advanced towards repairing the bridge, with interest thereon according to the decree; the amount of unclaimed dividends which had been expended for said repair, and also directed to be refunded with interest for nine months; for debt due from the bridge company, including costs of suit; the trustee's commission, auditor's bill, &c., and the payment to said fifteen hundred and nineteen shareholders of ten per cent. upon the cost of their stock, as per statement herewith submitted, amount to $18,991.11, leaving a balance in the trustee's hands of $3,222.41. [*415

"That the holders of the four hundred and seventy-three shares, which were deemed by the company to have been forfeited, (but which the court decided were not forfeited,) according to the cost of the same, amount to $20,749.17, ten per cent. on the same (being the dividend paid to the first-mentioned stockholders) amounts to $2,074.91, as per statement B herewith, leaving a balance, after paying said amount, in the hands of the trustee of $1,147.50.

"In ascertaining the cost of the shares to the present claimants, the auditor has taken pains, as far as possible, to ascertain the same. The principal claimants are John Glenn and the Messrs. Stewarts. In the case of Mr. Glenn, he states on oath, that the stock belongs to the estate of Robert Barry, and is held by him as trustee or administrator. Barry was an original subscriber. In the case of the Stewarts, they claim as having obtained it from D. Stewart's estate in the course of distribution, not as purchaser. D. Stewart was an original subscriber. In all other cases, the scale furnished from the president of the company of the current price of the stock at

the periods of transfer, have been the sole guide by which to fix the value. Several of the stockholders on the list are known to be dead, and it is not known to the auditor who their representatives are; but in making a distribution of this fund, their rights ought to be preserved, and their fair dividend paid when demanded.

"Dr. May, the trustee, claims $1,000 for his commission on the money received from the Treasury, $20,000, for the sale of the bridge. The charge has been objected to by some of the claimants, and the auditor has reduced it to $500; if he has erred in this, the court can correct it.

"The amount of the unclaimed dividends used for repairing the bridge, $568.25, and nine months' interest thereon, $25.57, making $593.82, has been in part paid, but a very considerable part, in all probability, never will be called for, as many of
*416] the persons who *were entitled to it are dead, and some insolvent; their representatives knowing nothing of the small amount so many years due. The complainants, however, in the present cause, have no claim on the unclaimed money due to others.

"As regards the disposition to be made of the balance which will remain in the hands of the trustee, ($1,147.50,) after paying the stockholders ten per cent., the auditor begs reference to his remarks on the general statement herewith.

"Submitted by

"JOSEPH FORREST, Auditor."

Whereupon the court made the following decree in the premises:

"The report of the auditor in this case having been filed, together with the accompanying statements by him made, and constituting part of the same, and being fully considered by the court, it is, this fourth day of June, eighteen hundred and forty-two, ordered and decreed, that the same be, and it is in all respects confirmed. And the said cause coming on for final hearing upon the bill, answer, replication, exhibits, evidence, report of auditor, &c., and being maturely considered, it is further ordered, adjudged, and decreed, that the complainants are entitled to the relief prayed, in conformity with the report of said auditor as aforesaid, and that the relief be extended to the other stockholders in said company in the proportions and for the sums mentioned in the statement by the auditor of the stockholders in said company who have not participated in the dividends of said bridge company. And it is further ordered and decreed, that the said defendants pay over to said parties respectively, or to their solicitors on

record, the said sum so due to them respectively, in conformity with said report and statement and of this decree, together with the costs of this suit to be taxed by the clerk, including the costs of the Supreme Court, on or before the first day of July, 1842, and file with said clerk, on or before said first day of July, 1842, a statement of said payments so made.

"By order of the court."

From this decree the bridge company appealed to the Supreme Court.

Bradley, for the appellants.
Coxe, for the appellees.

Bradley referred to the record to show, that the decree first appealed from was an interlocutory, and not a final decree, and that the Supreme Court had not jurisdiction in such a case. He then proceeded thus:

The appellants are not estopped from denying the jurisdiction of the Supreme Court to which they appealed in that cause, as the want of jurisdiction is apparent in the record. See *Wilson* v. *Hobday*, 4 Mau. & Sel., 120.

*That was debt on a replevin-bond given by the defendant to the Mayor of Canterbury, and the breach [*417 assigned was, that the defendant did not appear and prosecute his replevin in the Mayor's Court. The defendant demurred to the declaration, and, among other things, assigned as cause of demurrer, that it did not appear upon the declaration that the mayor had jurisdiction to grant replevins, and to take bond, &c.

The court was of opinion that it did sufficiently appear, that the mayor *prima facie* had jurisdiction, and upon that ground only overruled the demurrer; whereas if they had been of opinion that the defendant was estopped to deny the jurisdiction, because he had resorted to that court for relief, they would have decided the case upon that ground rather than on the doubtful ground, that the mayor had jurisdiction, and which they took great pains to support.

See also *Ketland* v. *The Cassius*, 2 Dall., 368. "The court is bound to take notice of a question of jurisdiction whenever it may occur, and however it may be proposed; for, if we are satisfied that we have not legal cognisance of any cause, or in terms less direct, if we are not satisfied that we have cognisance, we ought not to proceed to a decision or an investigation upon its merits." Per Wilson, J.

A plaintiff may assign for error the want of jurisdiction in that court to which he had chosen to resort. It is the duty

of the court to see that they have jurisdiction, for the consent of parties cannot give it; and if they decide a case of which they have no jurisdiction, it is the error of the court. The decision is void because *coram non judice*. *Capron* v. *Van Noorden*, 2 Cranch, 126.

Crow v. *Edwards*, Hob., 5. "Consent of parties cannot change the law:" *à fortiori* cannot give jurisdiction.

"The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous, if the jurisdiction be not shown upon them;" but *quære*, whether judgments in such cases are absolute nullities, which may be totally disregarded? For, it does not follow that the court had not jurisdiction, because all the circumstances necessary to give jurisdiction do not appear in the proceedings. It is error, however, not to state them; and the judgment may, therefore, be reversed. But, if it does appear upon the proceedings that the court had not jurisdiction, the judgment is an absolute nullity, and may be totally disregarded. See *Kempe's Lessee* v. *Kennedy*, 5 Cranch, 185; *The Life Insurance Company* v. *Adams*, 9 Pet., 602, before cited; *Decatur* v. *Paulding*, 14 Id., appendix, 609, and *Skillern's Ex.* v. *May's Ex.*, 6 Cranch, 268, in which the Supreme Court decided, that as the merits of the cause had been finally decided in that court, and its mandate required only the execution of its decree, the Circuit Court was bound to carry that decree into execution, although the jurisdiction of that court was not alleged in the pleadings.

*418] *Letters of administration, granted while there is a qualified executor capable of acting, are absolutely void. *Griffith* v. *Frazier*, 8 Cranch, 26.

In the case of *Houston* v. *Moore*, 3 Wheat., 433, the court said, that the jurisdiction of the Supreme Court under the 25th section of the Judiciary Act of 1789 extends only to a final judgment or decree; and that a judgment reversing that of an inferior court, and awarding a *venire de novo*, is not a final judgment; and in *Martin* v. *Hunter*, 1 Wheat., 355, that a decree affirming an interlocutory decree is not a final decree; and in *Weston* v. *City of Charleston*, 2 Pet., 454, that a final judgment is that which determines the particular cause: it need not finally decide upon the rights litigated; and in *Rutherford* v. *Fisher*, 4 Dall., 22, that a decree, overruling in equity a plea of limitations, and ordering the defendant to answer, is not a final judgment; and Chase, J., said that "in England a writ of error may be brought upon an interlocutory decree or order; but here the words of the act allow it only in the case of a final judgment." In *Young* v. *Grundy*.

6 Cranch, 51, the Supreme Court said, no appeal or writ of error will lie to an interlocutory decree dissolving an injunction—the same in *Gibbons & Ogden*, 6 Wheat., 448; and in *The Palmyra*, 10 Id., 502, a decree for restitution, with costs and damages, before the court had acted upon the report of the commissioner as to the damages, was held not to be a final decree.

In *Owen* v. *Hurd*, 2 T. R., 643, 644, it appeared that the court had no jurisdiction, because the arbitration had not been made a rule of court. The parties agreed to waive the objection and go into the merits, but Lord Kenyon, C. J., said, "that could not be done; for the court were bound to take notice that they had no jurisdiction; and he remembered an instance, many years ago, when, there being no title to the affidavits in the cause, the court said they could not take any notice of them, even though the counsel on the other side did not wish to take the objection." See *Bingham* v. *Cabot et al.*, 3 Dall., 32 *n.* In *Ross* v. *Triplett*, 3 Wheat., 600, the Supreme Court said, that its jurisdiction extends only to final judgments and decrees of the Circuit Court of the District of Columbia, not to cases where the opinion of the judges of that court were divided.

In the case of *The Abby*, 1 Mason, 363, 364, Mr. Justice Story said, "It cannot be admitted, that any party can first affirm the jurisdiction by taking the property on bail, and then turn round and deny the same jurisdiction, when the court can no longer administer effectual relief to the interests of other persons. The party is estopped by his own acts from such a proceeding. A plea to the merits is an admission that the jurisdiction of the court is well founded, and a decree upon those merits cannot afterwards be arrested, unless the defect of jurisdiction be apparent on the face of the record."

*But if the defect of jurisdiction be already apparent on the face of the record, and there is no necessity to introduce into the record any fact to show the want of jurisdiction, the party is not estopped from availing himself of such defect, and the court is as much bound to take notice of it as if it had been pleaded. [*419

So in *Fisher* v. *Harnden*, 1 Paine, 58, Mr. Justice Livingston said, "Where a court has jurisdiction, it has a right to decide every question that occurs in the cause; and, whether its decision be correct or otherwise, its judgment, until reversed, is considered as binding. But if it act without authority, its judgments are considered as nullities, and form no bar to a recovery, which may be sought in opposition to them, even prior to a reversal."

If, then, the judgment of this court, thus technically affirming the interlocutory decree of the Circuit Court, is a mere nullity, as we think it is, the cause now comes before this court for the first time upon its real merits, and the counsel for the original defendants, now appellants, respectfully submit the following argument.

(The argument of Mr. *Bradley* upon the merits of the case is omitted, because the decision of the court turned upon the preceding point.)

Coxe, for appellees.

This case originated in a bill in equity filed by the appellees, on behalf of themselves and others in the Circuit Court for the county of Washington, in May, 1833.

After a tedious prosecution of the cause, a decree was rendered in November term, 1838, by the Circuit Court. The chief judge, Cranch, being interested in the case, as one of the defendants, did not sit in the cause, and, consequently, the decree was made by the concurring opinions of the two other judges.

The decree having been made, the defendants, now the appellants, prayed an appeal to the Supreme Court, and, in January term, 1840, the decree of the Circuit Court was affirmed with costs. The mandate from the Supreme Court directed to the Circuit Court, commanding that such execution and proceedings be had in the said case, as, according to right and justice, and the law of the United States ought to be had, was filed on the 3d April, 1840.

The case was referred to the auditor to state an account in conformity with the principles laid down in the decree. The auditor made his report in November term, 1841. To this report no exceptions were taken by either party, and it was accordingly, in conformity with the practice of the Circuit Court, confirmed 4th June, 1842.

From this decree the defendants again appeal, and thus the case is for the second time brought up for decision.

It will be observed by the court that the argument sub
*420] mitted on behalf of the appellants, presents no objec tion to any proceeding or *action of the Circuit Court subsequent to the former decree of this court. It contains no objection to the report of the auditor, no allegation that it was not in precise accordance with the mandate of this court issued in January, 1840.

The argument now addressed to the court on the part of the appellants seeks to establish three positions:

1. That the former decree, having been made by a divided

court, is not to be regarded as an adjudication of the rights of the parties.

2. That inasmuch as further proceedings were necessary to carry out that decree, the decree of the Circuit Court then appealed from was not final, and consequently the Supreme Court had no jurisdiction of the case, and all its proceedings being *coram non judice*, are null and void.

3. That the real merits of the case being open now for the first time, this court will re-examine those merits, and decree in opposition to its former judgment.

These questions have an importance far beyond the interests involved in this particular case.

1. The question is, not what is to be recognized here or elsewhere as the authority of a decision of the Supreme Court when the judges were equally divided, in case such decision should be cited as an authoritative adjudication of principles. It is, however, insisted that this case was decided—that it passed into *rem judicatam*. The law is perfectly well settled that when this court is equally divided in opinion upon a writ of error, the judgment of the inferior court is affirmed. *Etting* v. *Bank of United States*, 11 Wheat., 59. The judgment has the same force and effect in every particular as if it had passed by the unanimous opinion of the court.

2. The decree of the Circuit Court upon which the decree of affirmance passed, not being a final judgment, this court had no jurisdiction.

This ground of objection is not entitled to much favor from this court. The now appellant was then the appellant. He invoked the jurisdiction of this court, and having been unsuccessful in his application, now denies the validity of his own acts, disclaims a jurisdiction which he himself sought, and denies the authority of the court into which he himself compelled his antagonist to meet him.

But the answer to this objection is twofold:

1. The question is not now open whether or not this court had jurisdiction of the former case; nor has this court now jurisdiction to examine its own judgment passed four years since, and to reverse it for any cause of error. *Skillern's Ex'ors* v. *May's Ex'ors*, 6 Cranch, 267.

The question certified from the Circuit Court of Kentucky to the Superior Court for its decision, was whether the cause could be dismissed from the Circuit Court for want of jurisdiction after the *case had been removed by writ [*421 of error to the Supreme Court, and that court had acted upon

it and remanded the cause to the Circuit Court for further proceedings. It was held that the objection came too late.

It is manifest that if the Circuit Court had no jurisdiction of the case, that the only question over which this court could exercise authority was the single one of jurisdiction. When, therefore, it was held that it was too late to question the jurisdiction of the Circuit Court, *à fortiori* it was too late to question that of the Supreme Court.

The ground of objection now urged existed when the case was formerly before the Supreme Court. It might then have been urged. If not noticed by counsel, it was competent for the court *ex mero motu* to take cognisance of it, and to dismiss it for that cause. In adjudicating upon the merits of the case, this court has, by necessary implication, asserted its jurisdiction. It is alleged that the judgment was not final. This point was fully argued in *McDonough* v. *Millaudon*, at the present term. The whole law of the case was settled; nothing remained but the ministerial duty of stating the account, which is in the nature rather of an execution to carry out the decree.

If there be error in this, how can this error now be rectified? It will hardly be contended that this can be assimilated to some which have been cited, and that the judgment rendered in 1840 was *coram non judice*, and consequently an absolute nullity.

In *Kempe's Lessee* v. *Kennedy*, 5 Cranch, 185, this court held that such was not the case in regard to the courts of the United States. If jurisdiction does not appear on the face of their proceedings, their judgments are erroneous and reversible, but they cannot be considered as nullities which may be totally disregarded.

In this aspect of the case, the present appeal, although nominally and in form an appeal from a decree of the Circuit Court rendered in June, 1842, is substantially an appeal from a decree of this court rendered in January, 1840.

It is contended upon this point,

1. That there is no mode pointed out by law in which an erroneous judgment of this court can be reviewed and reversed either in this or any other court.

2. That upon this appeal nothing is before this court but the proceedings of the Circuit Court upon and subsequent to the mandate.

Both of these points have been conclusively settled by a series of adjudications:

Himely v. *Rose*, 5 Cranch, 316. This cause came up a second time by an appeal, and the chief justice declared that

nothing was before the court except what was subsequent to the mandate. In 316, in delivering the opinion of the court, he again says, "A decree *having been formerly [*422 rendered in this cause, the court is now to determine whether the decree has been executed according to its true intent and meaning."

Martin v. *Hunter's Lessee*, 1 Wheat., 364. This case was brought before the Supreme Court on a writ of error upon proceedings subsequent to the mandate formerly awarded, and the error assigned was in the judgment of the court of appeals of Virginia, which had solemnly decided, that the Supreme Court did not possess the appellate jurisdiction which it had exercised in rendering the former judgment. The points of difference which distinguish that case from the one at bar are, 1st, that in *Martin* v. *Hunter*, the court below had adjudged that this court had no jurisdiction, and therefore its proceedings were *coram non judice;* here the Circuit Court has without hesitation recognized the authority of this court, and as in duty bound executed its mandate. 2d. In *Martin* v *Hunter*, the objection was made by a state court jealous of its rights and powers, and by parties brought unwillingly before the federal tribunal; here it is the suggestion of the very party who voluntarily invoked the appellate jurisdiction of this court. 3d. In that case the judgment of the inferior court embodied and asserted the defect of jurisdiction, and it was that judgment which was to be reviewed; in this case it is sought to give to this appeal the force and effect of an appeal directly from the decree of the Supreme Court itself.

In p. 355, the court says, "To this argument several answers may be given. In the first place, it is not admitted that upon this writ of error the former record is before us." "In the next place, in ordinary cases a second writ of error has never been supposed to draw in question the propriety of the first judgment, and it is difficult to perceive how such a proceeding could be sustained upon principle. A final judgment of this court is supposed to be conclusive upon the rights which it decides, and no statute has provided any process by which this court can revise its own judgments. In several cases which have been formerly adjudged in this court, the same point was argued by counsel and expressly overruled. It was solemnly held that a final judgment of this court was conclusive upon the parties and could not be re-examined." *Browder* v. *McArthur*, 7 Wheat., 58.

On an appeal, after a mandate, counsel applied for a rehearing of the original case. The court refused to allow it, being

of opinion that it was too late to grant a rehearing after the cause had been remitted to the court below, &c.; and that a subsequent appeal from the Circuit Court for supposed error in carrying into effect such mandate, brought up only the proceedings subsequent to the mandate, and did not authorize an inquiry into the merits of the original decree. The *Santa Maria*, 10 Wheat., 442.

Himely and Rose is affirmed, and it is said that the original proceedings are before the court on the second appeal only for the purpose of enabling it to see and adjudge any new points which were not terminated by the original decree. *Ex parte Sibbald*, 12 Pet., 492.

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We think proper to state our settled opinion of the course which is prescribed by the law for this court to take, after its final action upon a case brought within its appellate jurisdiction, as well as that which the court whose final decree or judgment has been thus verified ought to take. Appellate power is exercised over the proceedings of inferior courts, not on those of the appellate court. The Supreme Court have no power to review their decisions, whether in a case at law or equity. A final decree in chancery is as conclusive as a judgment at law. Both are conclusive on the rights of the parties thereby adjudicated.

No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term in which they have been rendered, except for clerical mistakes, or to reinstate a cause dismissed by mistake; from which it follows, that no change or modification can be made which can vary or affect it in any material thing.

When the Supreme Court have executed their power in a cause before them, and their final decree or judgment requires some farther act to be done, it cannot issue an execution, but shall send a special mandate to the court below to award it. Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree, as the law of the case, and must carry it into execution according to the mandate. They cannot vary it, or examine it for any other purpose than execution; or give any other or farther relief; or review it upon any matter decided on appeal, for error apparent; or intermeddle with it, farther than to settle so much as has been remanded. After a mandate, no rehearing will be granted. It is never done in the House of Lords; and on a subsequent appeal nothing is brought up but the proceedings subsequent to the mandate. After this distinct exposition of the law by the Supreme Court, it would be

a work of supererogation for me to vindicate it from the charge of usurping a jurisdiction not vested in it by law, or to establish the correctness of a judgment which this high tribunal has rendered. Should this be deemed important, I proffer myself ready to show that the former decree of the Circuit Court was a final decree, within the meaning of the judicial act and the practice of this court; and that the decree, as well as that affirming it, was right.

No exception having been taken to the report of the auditor, and no error being assigned in that or in the final decree, it is submitted that the case is within the 17th rule of the court, and that the decree of the Circuit Court should be affirmed, with ten per cent. damages.

*Mr. Justice WAYNE delivered the opinion of the [*424 court.

This cause is now before us upon an appeal from a decree of the Circuit Court, made by it upon an auditor's report, in conformity with the mandate issued by this court, when the cause was before it upon a former occasion.

The appellants did not except to the auditor's report, in the court below. When the cause was tried upon the first appeal, the decree of the Circuit Court was affirmed by a divided court.

We are now asked by the counsel for the appellants to permit him to re-examine the decree of the Circuit Court, upon its merits, affirmed as it was by the Supreme Court, upon the ground that the affirmance was made when this court had not jurisdiction of the case; the first appeal having been taken upon what has since been discovered to have been an interlocutory and not a final decree.

The Supreme Court certainly has only appellate jurisdiction, where the judgment or decree of the inferior court is final. But it does not follow, when it renders a decree, upon an interlocutory and not a final decree, that it can, or ought, on an appeal from a decree in the same cause, which is final, examine into its jurisdiction upon the former occasion. The cause is not brought here in such a case for any such purpose. It was an exception, of which advantage might have been taken by motion on the first appeal. The appeal would then have been dismissed for the want of jurisdiction, and the cause would have been sent back to the Circuit Court for farther proceedings. But the exception not having been then made of the alleged want of jurisdiction, the cause was argued upon its merits, and the decree appealed from was affirmed by this court. Its having been affirmed by a divided court, can

make no difference as to the conclusiveness of the affirmance upon the rights of the parties. It is settled, that when this court is equally divided upon a writ of error or appeal, the judgment of the court below stands affirmed. *Etting* v. *Bank of the United States*, 11 Wheat., 59; the case of the *Antelope*, 10 Wheat., 66. Having passed upon the merits of the decree, this court has now nothing before it but the proceedings subsequent to its mandate. So this court said in *Himely and Rose*, and in the case of the *Santa Maria*, 5 Cranch, 314; 10 Wheat., 431. Its decree became a matter of record in the highest court in which the cause could be finally tried. To permit afterwards, upon an appeal from proceedings upon its mandate, a suggestion of the want of jurisdiction in this court, upon the first appeal, as a sufficient cause for re-examining the judgment then given, would certainly be a novelty in the practice of a court of equity. The want of jurisdiction is a matter of abatement, and that is not capable of being shown for error to endorse a decree upon a bill of review. Shall the appellant be allowed to do more now, than would be permitted on a bill of review, if this court had the power to
*425] grant him such a remedy? If he was, we should then have a mode for the review of the decrees *of this court, which have become matters of record, which could not be allowed as an assignment of error for a bill of review, in any of those courts of the United States in which that proceeding is the ordinary and appropriate remedy.

The application has been treated in this way, to show how much at variance it is with the established practice of courts of equity.

It might, however, have been dismissed, upon the authority of a case in this court, directly in point, *Skillern's Executors* v. *May's Executors*, 6 Cranch, 267, and upon the footing that there is no mode pointed out by law, in which an erroneous judgment by this court can be reviewed in this or any other court. In *Skillern's* case, the question certified by the court below to this court, for its decision, was, whether the cause could be dismissed from the Circuit Court, for want of jurisdiction, after the cause had been removed to the Supreme Court, and this court had acted upon and remanded the cause to the Circuit Court, for further proceedings. This court said, "It appearing that the merits of the cause had been finally decided in this court, and that its mandate required only the execution of its decree, it is the opinion of this court that the Circuit Court is bound to carry that decree into execution, although the jurisdiction of that court is not alleged in the pleading." The jurisdiction of this court, in that case,

was as defective as it is said to have been in this. When that cause was before this court, though the judgment of the court below on it would have been reversed, upon motion, for the want of jurisdiction on the face of the record, the defect having escaped the notice of the court and of counsel, and the court having acted upon its merits, it determined that its decree should be executed. The reason for its judgment no doubt was, that the motion to dismiss the case, in the court below, for the want of jurisdiction, after it had been before the Supreme Court by writ of error, and had been acted upon, would have been equivalent, had it been allowed, to a decision that the judgment of this court might be reviewed, when the law points out no mode in which that can be done, either by this or any other court. The want of power in this court to review its judgments or decrees, has been so frequently determined by it, that it is not now an open question. Such is the result of what the court said in *Himely and Rose*, 5 Cranch, 314. The court says, in *Martin* v. *Hunter's Lessee*, 1 Wheat., 304, in reply to the allegation that its judgment had been rendered when it had not jurisdiction, "To this argument several answers may be given. In the first place, it is not admitted that upon this writ of error the former record is before us. In the next place, in ordinary cases, a second writ of error has never been supposed to draw in question the propriety of the first judgment, and it is difficult to perceive how such a proceeding could be sustained on principle. A final judgment of this court is supposed to be conclusive upon the rights it decides, and no statute has provided any process by which this court can reverse its [*426 *judgments. In several cases formerly adjudged in this court, the same point was argued, and expressly overruled. It was solemnly held, that a final judgment of this court was conclusive upon the parties, and could not be re-examined." In *Browder* v. *McArthur*, 7 Wheat., 58, counsel applied for a re-hearing; the court refused it, saying a subsequent appeal brought up only the proceedings subsequent to the mandate, and did not authorize an inquiry into the merits of the original decree. The same is said with equal positiveness in the case of the *Santa Maria*, 10 Wheat., 442. To these cases we add an extract from the opinion of the court, given by the late Mr. Justice Baldwin, in *Ex parte Sibbald*, 12 Pet., 492. That case called for the most careful consideration of the court. "Before we proceed to consider the matter presented by these petitions, we think it proper to state our settled opinion of the course which is prescribed by the law for this court to take, after its final action upon a case, brought within its

appellate jurisdiction, as well as that which the court, whose final decree or judgment has been thus verified, ought to take. Appellate power is exercised over the proceedings of inferior courts, not on those of the appellate court. The Supreme Court has no power to review its decisions, whether in a case at law or in equity. A final decree in chancery is as conclusive as a judgment at law. 1 Wheat., 355; 6 Id., 113, 116. Both are conclusive of the rights of the parties thereby adjudicated."

These cases are decisive of the motion made in this case, and as the decree now appealed from carries into execution the mandate issued by this court upon the first appeal, we direct it to be affirmed.

RICHARD NUGENT, ASSIGNEE OF ELIZABETH NORTON, IN BANKRUPTCY, PLAINTIFF IN ERROR, *v.* GEORGE W. BOYD, ISAAC T. PRESTON, AND ABNER PHELPS, DEFENDANTS.

The principles established in the case of *Ex parte the City Bank of New Orleans* in the matter of *Christy, assignee of Walden, ante*, p. 292, renewed and confirmed.

But this court does not decide, whether or not the jurisdiction of the District Court over all the property of a bankrupt, mortgaged or otherwise, is exclusive, so as to take away from the state courts in such cases.[1]

THIS case came up by appeal from the Circuit Court of the United States for East Louisiana, sitting as a court of equity.

The controversy was between the bankrupt's assignee, on one side, and a mortgage creditor and purchasers at the sale under *427] state process of the mortgaged premises, on the other. The points to be *decided grew out of the bankrupt law, and especially out of the saving in favor of state liens in the 2d section, and the jurisdiction granted to the District and Circuit Courts of the United States in cases of bankruptcy by the 6th and 8th. The validity of certain rules established by the District Court of Louisiana, sitting in bankruptcy, was questioned, and the mortgage creditor, not having proved under the commission, claimed exemption from those rules, and asserted the right to pursue his prior lien in the state court.

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[1] COMPARE. *Houston* v. *City Bank of New Orleans*, 6 How., 506; *Ray* v. *Norseworthy*, 23 Wall., 128. CITED. *Kimberling* v. *Hartly*, 1 McCrary, 141. See also *Claflin* v *Houseman*, 8 Otto, 135. *In re Davis*, 1 Sawy., 262.

The complainant's bill stated in substance, that Elizabeth Norton filed her petition to be declared a bankrupt, on the 9th May, 1842. On the 1st June, it was decreed accordingly, and Richard Nugent appointed assignee.

At the time, and long before the date of the petition, George W. Boyd, one of the defendants, was the holder of notes, secured by mortgage duly recorded according to the laws of Louisiana, for the sum of $9,000, on which judgment had been rendered, order of seizure and sale granted, and execution issued and been levied, all before the date of the bankrupt's petition. The levy took place on the 16th of February, 1842. The sale was the only proceeding after the date of the decree of bankruptcy; that decree being dated the 1st, and the sale taking place on the 4th of June, 1842.

The bill admitted that all the forms and notices, &c., required by the laws of Louisiana for the sale of mortgaged premises under execution, were observed; but set up the petition and decree of bankruptcy, made before the sale, and alleged, that before the property was sold the assignee gave written notice of the decree, and of his appointment as assignee under it, to the sheriff, the mortgage creditor, Boyd, and to Preston and Phelps, who afterwards became the purchasers of the mortgaged premises at sheriff's sale, cautioning them respectively, and claiming at the same time the right to stay the sale, and take the property into his own hands for sale and distribution under the rules of the bankrupt court. Copies of the proceedings in bankruptcy and of the rules of the bankrupt court were made exhibits to the bill. These general orders of the District Court of the United States for the district of Louisiana, sitting in bankruptcy, and purporting to be made in pursuance of the authority delegated to it by the Bankrupt Act, and especially the 6th section thereof, provided, in substance, that notice should be served on all creditors of the bankrupt who had any special mortgage, lien, or privilege. The assignee was authorized to take a rule on the mortgage creditor to show cause why the mortgaged premises should not be sold by the assignee; and the court would thereupon pass an order of sale, which order should *ipso facto* annul the mortgages, liens, &c., existing on the property sold, and upon its presentation to the recorder of mortgages, he should be required to cancel the inscription of all such mortgages, liens, &c., on his records; and the liens, privileges, &c., should attach to the proceeds in the hands of the assignee. [*428 The mortgage creditor was entitled, under certain reservations, to prescribe the terms of sale, and at such sale might become the purchaser, but was required to pay the

expenses and commissions on the sale, and the surplus, if any, over and above the amount of his mortgage; but these privileges were allowed only on the condition of his filing the proof of his debt in the registry of the court.

The complainant alleged, that by the act of Congress the rules aforesaid made in pursuance thereof, and the proceedings thereunder in the case of the bankrupt, the sale should have been stayed, and the said George W. Boyd having been notified and cited to appear and contest the proceedings in bankruptcy, all the acts done under color of the state process, after the date of the petition, were irregular and void; that Preston and Phelps having also been notified and cautioned, they derived no title from the sheriff's sale, such sale being invalid.

The bill prayed that the sheriff's sale might be set aside, the title of Preston and Phelps declared null; that George W. Boyd be compelled to come into the District Court, sitting in bankruptcy, and conform himself in all things to the rules of said court in such cases, and for other and general relief.

To this bill there was a demurrer, which, admitting all the facts, insisted, in point of law,

1. That the petition, decree, appointment of the assignee, &c., did not prevent the mortgage creditor from enforcing his lien under the process of the state court.

2. That the District Court had no right to pass the rules insisted on.

3. That the mortgage creditor was not bound by law to submit his claims to the District Court, sitting in bankruptcy, but might elect not to prove his debt, and still pursue his lien and remedy under the law.

4. That the title obtained at the sheriff's sale was, according to the facts set forth by the complainant, a good title for the purchasers against the assignee.

On the hearing of the argument on the bill and demurrer, the Circuit Court sustained the demurrer, and ordered the bill of the complainant to be dismissed.

From this decree the complainant appealed.

The cause was submitted, upon printed arguments, by *Richard Nugent*, for the appellant, and *Wilde* and *Henderson*, for the appellees.

The argument for the appellant was as follows:—

It having been agreed by all parties to submit this case in printed briefs, so as to expedite its decision, and the final proceedings in the bankrupt court, the appellant respectfully

represents, that the facts *set forth by the bill being admitted by the demurrer, and substantially set forth in the statement of the appellees, it is unnecessary here to repeat them. The contest is one entirely of law; and as the best and most conclusive argument he can present, the appellant annexes hereto certain decisions heretofore made on the points in controversy in similar cases, by the Supreme Court of Louisiana, and the Circuit Court of the United States for the Louisiana district. These decisions were all rendered after elaborate argument, on due deliberation, and disclose so fully the reasons on which they are founded, that it cannot be requisite for the appellant to do more than state the principles established by them. These courts have considered, that, to prevent confusion, and secure uniformity of action and decision, it is indispensable that all the claims of all the creditors, without distinction, be brought before the bankrupt court, and that all the property to which the bankrupt may have any claim shall be administered, sold, and distributed, under the authority of that court, no matter what liens exist upon it. These liens themselves cannot, indeed, be disputed or impaired, and against that the rules of the bankrupt court have made due provision; but they cannot be enforced under state laws and process, for that must inevitably disturb the uniform and harmonious administration of the bankrupt act.

Hence it has been held, that, from the moment of filing the petition, the bankrupt became incompetent to stand in judgment in the state courts, and that the assignee in bankruptcy has the right to cause the state process to be stayed, to take the property into his own possession, and to sell it free from the mortgage, leaving to the mortgagee the right to claim the proceeds in the court of bankruptcy, under such rules as that court may prescribe. Such has been the practice of the bankrupt court in Louisiana, and the rules annexed as an exhibit to the bill were adopted by the District Court of the United States, in analogy to, or conforming with them. The power to prescribe such rules is given by the 6th section of the Bankrupt Act, and they contain nothing repugnant to the proviso in the second section, since the state liens are saved.

There is also a distinction to be noted between the legal effect of a mortgage in the state of Louisiana, and the common law mortgage. Under the latter, the legal title passes to the mortgagee. According to that system, therefore, the assignee does not acquire the legal title by the assignment, and mortgaged property consequently is not subject to administration and sale, as part of the bankrupt's effects. The mortgage of Louisiana is thus defined: "Mortgage is a right granted to

the creditor over the property of his debtor, for the security of his debt, and gives him the power of having the property seized and sold in default of payment." Civil Code of Louisiana, art. 3245.

*430] Hence the legal estate in, and possession of, the mortgaged premises *in Louisiana, remains in the mortgagor, and passes to his assignee. Being seized of the legal estate and in possession, it is for him to sell. In other states, the legal title passing to the mortgagee does not rest in the assignee of the bankrupt mortgagor, and consequently the decisions in other states are not applicable here.

The argument for the appellees was the following:

The decisions of the Supreme Court of Louisiana, and the Circuit Court of the United States, for the Louisiana district, as well as the rules in cases of bankruptcy, adopted by the District Court, all of which are relied upon by the complainant, proceed upon the mistaken assumption of an analogy between the *cessio bonorum* or *concurso de acreadores* of the Louisiana law, and the Bankrupt Act of the United States, and a supposed obligation or authority to model the one upon the other. There is no such analogy and no such authority.

The Louisiana *concurso* requires all the creditors of the bankrupt to come in, grants an immediate cessation of all actions of every description against him, and vests in the syndic all his property without distinction, with power to sell, cancelling all mortgages and liens, and conveying an absolute and clear title to the purchaser. The rights of the several creditors are settled contradictorily, and the liens on the property sold, which have been cancelled by order of the syndic, attach upon the proceeds of the property in his hands. *Elwes* v. *Estevan*, 1 Marl., 193; Code of 1824, art. 2172; Greiner Lou. Dig., tit. *Insolvency*, 237; and the authorities quoted in *Fisher* v. *Vose*, 3 Rob. (La.), 475.

In the bankrupt law there is nothing of all this. The mortgage creditor is not compellable to prove his debt under the bankruptcy. He may rely upon his lien, and assert and prosecute it under the state law and process. There is no authority to stay his proceedings, unless his mortgage is fraudulent or void, or alleged to be paid off, none of which is pretended here.

If he elects to come into the bankrupt court and prove his debt, he thereby relinquishes his mortgage or other lien, and stands upon the same footing as an ordinary creditor. There is no power given by the Bankrupt Act to the court, or to the assignee, to discriminate in the distribution of the proceeds of property sold by the assignee, between creditors holding liens

on it and those holding none. The only authority the assignee has, is to redeem the mortgage under the order and direction of the court, (sec. 11.) If he does not choose to redeem, he has no power to enjoin the proceedings of the mortgage creditor. That would be to impair the lien, contrary to the proviso of the 2d section.

To prevent or obstruct the recovery of debts, has been held impairing the obligation of contracts. To prevent or obstruct the assertion of a lien, and take away the existing remedy upon it, must impair the lien.

*All the decisions of this court upon the former subject are authorities for us. [*431

The dissenting opinions of Judge Bullard, in the state of Louisiana, against the sheriff of the first judicial district, and J. D. Roasenda, for a prohibition, and in the case of F. B. Conrad, assignee of Thomas Banks, for a mandamus, which are before your honors in this case, outweigh, as we humbly contend, in soundness and acuteness of argument, the contrary decisions of his brethren.—*Scevola assentior.*

The wide range of judicial legislation exercised by the District Court, in providing that "the order of sale shall, *ipso facto*, annul the mortgages, liens, &c., existing on the property sold," and the vast addition to, and alteration in, the bankrupt law, thus made, cannot receive the sanction of this court. What part of the act authorizes the District Court to attach liens on the proceeds of property sold, to distribute such proceeds otherwise than ratably, without discrimination, or to force into its forum a mortgage creditor who chooses to rely upon his lien, and not to prove his debt?

Whence does that court derive its power to order a state register of mortgages to cancel the inscription of such mortgages on his records? If he refuses, how is such order to be enforced? If enforced, what is its effect? The Supreme Court of Louisiana, indeed, courteously lends its aid to enforce the decrees of the District Court sitting in bankruptcy, but will the courts of other states do so? If not, is the District Court of the United States armed with authority to enforce its own mandate against a state officer, in regard to his official duty under the laws of the state, as to the registration and cancellation of mortgages? Can such a pretension be maintained in all the states? And how is uniformity in the administration of the bankrupt law to be secured, by the adoption of rules going far beyond its text, and most certainly incapable of execution in many of the states?

This branch of the subject assumes a tenfold importance when the court considers that these rules and orders, and the

decrees passed under them, constitute a part of the extraordinary bankrupt jurisdiction granted to the District Court alone, under the 6th section. Such decrees, this court had decided, are without appeal. *Nelson* v. *Carland*, 1 How., 265.

While concurrent jurisdiction, therefore, is granted by the 8th section to the Circuit and District Courts, of all suits at law and in equity, which may be brought by an assignee against any one claiming an adverse interest, or by such person against the assignee, and the suit so brought may be carried, by appeal, to this tribunal, the hasty and inconsiderate orders of the District Court in bankruptcy, though they may work irreparable injury, are not subject to any supervision.

On the score of authority, it cannot be expected we should *432] do *more than produce the decisions of circuit or district judges. These questions have not yet been adjudicated in this court.

We rely on the following cases, decided by judges of this court on their circuits or by district judges, respectable for learning and ability:

The decision of Mr. Justice Baldwin in the matter of *Kerlin*, a bankrupt, reported in the United States Gazette, of Philadelphia, of 26th October, 1843.

The decision of Mr. Justice Story in the case of *Mitchell, assignee of Roper*, v. *Winslow and others*, in the Circuit Court of Maine, reported in the Law Reporter of Boston, for December, 1843, pp. 347 and 360.

Mr. Justice McLean's decision in the case of *N. C. McLean, assignee in bankruptcy*, v. *The Lafayette Bank, J. S. Buckingham and others;* to be found in the Western Law Journal for October, 1843, p. 15.

Mr. Justice McLean's decision in the case of *N. C. McLean, assignee*, v. *James F. Meline*. Western Law Journal for November, 1843, p. 51.

Mr. Justice Story's decision in the case of *Muggridge*, 5 Law Rep., 357. In *Ex parte Cooke*, Id., 444; *Ex parte Newhall*, Id., 808. In *Dutton* v. *Freeman*, Id., 452.

Mr. Justice Thompson's decision in *Haughton* v. *Eustis*, Id., 506.

Judge Prentiss's (of Vermont) opinion in *Ex parte Spear*, Id., 399; and *Ex parte Comstock*, Id., 165.

Judge Conkling's (of New York) opinion in *Ex parte Allen*, Id., 368.

Judge Monroe's (of Kentucky) opinion in Niles's Register, 5th November, 1842; and those of Irwin, Randall, and Gilchrist, Ibid.

These cases, it is humbly submitted, establ'sh the doctrine

for which the defendants contend, namely: that the state lien in this case was properly and rightfully enforced under the state law and process; that the rules of the District Court of Louisiana relied upon are void and without force, exceeding the jurisdiction of that court, and interpolating new principles into the Bankrupt Act; that the title acquired by Preston and Phelps, at sheriff's sale, under execution founded upon the mortgage, is good, valid against the assignee; and that the demurrer was properly sustained, and the bill rightfully dismissed.

"Proceedings in bankruptcy," as per section 6, are of exclusive cognisance in the District Courts of the United States.

These proceedings are but acts of administration upon property and accounts, closely resembling the administration of decedents' estates in the Courts of Probate. Proceedings in bankruptcy by virtue of the provisions of this section, are not "suits at law and equity," which may be brought by and against the assignee, touching *property or rights of [*433 property claimed to have belonged to the bankrupt, as per section 8. To entertain such suits, the Circuit and District Courts of the United States have "concurrent jurisdiction."

And of suits in court pending by and against a party who becomes bankrupt, such pending controversies do not abate by operation of the law upon the party's being declared bankrupt.

The jurisdiction of the state courts, as to such controversies, is not interfered with by the act of bankruptcy. The assignee becomes vested with the precise rights and condition of the bankrupt in respect to his property and controversies, which were possessed and sustained by the bankrupt on the day of his being "decreed" a bankrupt. And the bankrupt's suits pending are to be "prosecuted and defended (by the assignee) in the same way, and with the same effect, as they might have been by such bankrupt." Section 8.

In this case, the judgment of Boyd against the mortgagor, the order of seizure and sale, and the levy of execution, were all before the party filed his petition in bankruptcy.

Now, by the express provision of section 3, the assignee's rights and duties in respect to this state proceeding upon the mortgage, (irrespective of its being a question of mortgage,) were neither more nor less than to present himself in the court where the case was progressing to final execution, and there make any defence Norton, the bankrupt, might have done. But it wholly subverts the provision of section 8, to indulge the assignee in disregarding such pending controver-

sies, and then permit him to assume the attitude of plaintiff in the same case, commencing *de novo* in the District Court of the United States, and there to discard as *coram non judice* all that had been previously adjudged in the state court.

But besides that this was a case pending in a state court where the assignee should have made defence, as per section 3, as a question of mortgage, it has more distinction and immunity in the consideration of the Bankrupt Law. And in this aspect the District Court of the United States proceeding in bankruptcy had no jurisdiction of it, (unless the mortgagor had chosen to file his claim,) save and except to administer and sell the equity of redemption, or to redeem the mortgage, as per section 11.

There is no legitimate pretence this bill in chancery is a proceeding in bankruptcy. The District Court has no equity jurisdiction in this respect, but in virtue of section 8, and which confers it equally on the Circuit Court. And yet the bill seeks an administration in bankruptcy of this mortgaged property coercively against the mortgagor, within rules prescribed under the provisions of section 6. If this be so attainable, then the Circuit Court too, which has no original jurisdiction in bankruptcy, may nevertheless obtain it by bill in equity.

*434] *But all the pretensions of this bill are conceived to be unparalleled in the conflicting and imperious results it proposes.

Section 2, of the Bankrupt Act, is regarded as express authority to the assignee and the court in bankruptcy to impair, annul, and destroy this mortgage. And by the rule of court seizing upon the mortgage for administration in bankruptcy, to maintain a semblance of respect for the mandates of section 2, the provisions of section 5 are deliberately violated, which forbids any "priority or preference" to be awarded among private creditors. It assumes the right to treat as a nullity an ordinary state adjudication of a mortgage interest, fully rendered previous to any jurisdiction having attached to the bankrupt court. In truth, the state adjudication is adjudged of as an *ex post facto* usurpation. The jurisdiction was well enough in the state court inceptively, and throughout its progress to the rendition of judgment. But while the execution of the state court was being consummated, the debtor filed his petition. And this, the bill assumes, *ipso facto*, reversed the judgment of the state court or avoided it as a nullity.

In view of a fair interpretation of the Bankrupt Act, and of the disastrous considerations presented by the bill in this

case, we assure ourselves with the belief, that results so unjust, so inharmoniously absurd, will not be sustained in the reversal of this decree.

The lien of a judgment and execution attaches as to real estate upon the rendition of the judgment, as to personal property upon the seizure or levy of the execution. Code of Practice, art. 722, 723; Civil Code, art. 3289, 3290, 3291, 3292; *Duffy* v. *Townsend*, 9 Mart. (La.), 585; *Bradbury and Foster* v. *Morgan*, 2 La., 479.

Here the levy or seizure was before the date of the petition in bankruptcy, and the lien of the judgment had attached even if the property levied on had been personal, much more when it was real.

The order of seizure under a mortgage is by the law of Louisiana a judgment from which appeal lies to the Supreme Court, and on which, upon a proper case shown, injunction may issue. *Gurlie* v. *Coquet*, 3 Mart. (La.), N. S., 498; *McDonough* v. *Zacharie*, 3 La., 316; Code of Practice, tit. *Injunction*, art. 296, 309; *Wells* v. *Hunter*, 6 Mart. (La.), N. S., 311; *Crane* v. *Phillips*, 7 Id., 276; 8 Id., 683; 3 Id., 480; 4 Id., 499.

Mr. Chief Justice TANEY delivered the opinion of the court.

It appears in this case, that, in January, 1844, a bill was filed in the Circuit Court of the United States for the eastern district of Louisiana, sitting in chancery, by Richard Nugent, assignee of the estate of Elizabeth Norton in bankruptcy, stating, that the said Elizabeth Norton, on the 9th day of May, 1842, filed her petition in the District Court of the United States to be declared a bankrupt, and that she was accordingly decreed to be such about the 1st of June, [*435 in *the same year; that she returned in her schedule two lots of ground in the city of La Fayette, particularly described in the bill; and that George William Boyd was, among others, returned as a creditor for the sum of $9000, and that notice was served on him of the proceedings in bankruptcy. The bill further states, that prior to and at the time of the petition in bankruptcy the two lots above mentioned were affected by a special mortgage to the said Boyd, which was valid by the laws of Louisiana, for the sum of $9000 and upwards; that prior to the bankruptcy of Elizabeth Norton, that is to say, about the 11th of November, 1841, Boyd commenced suit upon his said mortgage in the proper state court of Louisiana, and obtained judgment, with the privileges of a mortgage, and issued execution thereon, which was levied upon the said property about the 16th of February,

1842; and on or about the 4th of June following the property was regularly sold by the sheriff under the execution to Isaac T. Preston and Abner Phelps, who took possession of the said two lots and continue to hold them, claiming as owners. The bill further states, that the complainant, having received notice of the levy and intended sale under the execution, duly notified the said Boyd, Preston, Phelps and the sheriff in writing, before the sale, of his appointment as assignee as aforesaid, and cautioned them not to proceed with the sale; but that the parties, continuing and intending to defeat the just rights of the complainant, proceeded to sell, and placed the purchasers above mentioned in possession of the property in question. The complainant refers to and exhibits with his bill certain rules adopted by the District Court of the United States for the disposition of real estate surrendered by bankrupts, and encumbered by mortgages; and charges, that by virtue of the Bankrupt Act all the proceedings in the state court ought to have been stayed, from the moment the petition of the bankrupt was filed; and that the subsequent proceedings were irregular, and conferred no title on the purchasers; and that the complainant was entitled to take the property from the hands of the sheriff, and to administer and sell the same under the direction of the District Court by virtue of the act of Congress and the rules of court above mentioned. The bill then prays process against Boyd, Preston, and Phelps, and that the proceedings under the execution subsequent to the petition in bankruptcy should be declared irregular; that the title of Preston and Phelps from the sheriff should be decreed to be null and invalid, and the said Preston and Phelps be ordered to restore the said lots to the possession of the complainant, to be administered and sold by him in conformity with the orders of the District Court of the United States, and in pursuance of the rules before referred to; and that Boyd should be directed to come into the District Court, and conform himself to the orders of the court and the rules aforesaid.

*436] The defendants appeared, and demurred to the bill; and upon *final hearing on the demurrer, the following decree was passed by the Circuit Court:—

"This is a bill in equity, presented by an assignee in bankruptcy, to set aside a certain sale, made under a writ of seizure and sale from the District Court of Louisiana, upon the ground that the District Court of the United States was, by the bankrupt law passed by Congress on the 19th of August, 1841, vested with exclusive jurisdiction over all matters appertaining to the settlement of the affairs of the bankrupt; and that, consequently, the sale made by the District Court of

Louisiana has transferred no legal title to the property. The bill further claims the property sold as a part of the property of the bankrupt to be sold or otherwise disposed of under the orders of the District Court of the United States. It appears that the property in question consists of real estate, and that the same was sold to satisfy a special mortgage held by the creditor who obtained the order of seizure and sale from the state tribunal.

"I have, after an attentive consideration of the various allegations in the bill, ordered the same to be dismissed, and shall now proceed to state very briefly the grounds upon which I acted. In the first place, I do not consider that there is any equity in the bill; the property was specially mortgaged to satisfy the claim of the creditor who demanded the sale; and it does not appear that in the assertion of his right he has in any manner interfered with the rights of the other creditors of the bankrupt. It does not appear that any doubt existed as to the validity of the mortgage, or that the creditor has obtained any right or any advantage over the other creditors which the District Court, sitting in bankruptcy, would not have been bound to award him under the express provisions of the bankrupt law. It is quite clear that the liens and mortgages which are valid under the state law must be protected by the District Court of the United States, sitting in bankruptcy, and it will not be pretended that the creditor at whose instance the property in question was sold would not have been entitled, under any and all circumstances, to the proceeds of that property to satisfy the amount alleged to be due him. What benefit would then accrue to the general creditors of the bankrupt by the interference of this court in a matter which seems to have been fairly and finally adjudicated? While I am well satisfied that no good would arise from such an interference, I am equally well satisfied that great injustice would be done both to the mortgage creditor and to the estate of the bankrupt, by subjecting both unnecessarily to additional costs and expenses.

"I agree fully in the opinion, that upon the ground of expediency the jurisdiction of the District Court of the United States over all the property of the bankrupt, mortgaged or otherwise, should be exclusive; but I do not understand the bankrupt law to render it so. Where a creditor, by virtue of a special mortgage, elects to foreclose that mortgage before a state tribunal, the federal court is not called *upon to [*487
interpose, except in cases where from the nature of the case wrong or injustice may be done to other creditors in interest, or where the mortgage itself may be contested.

"I wish it, however, to be distinctly understood, that I am fully of opinion that the District Court of the United States is vested with jurisdiction over mortgaged property belonging to the bankrupt, and that when a proper case is shown, it has power to foreclose a mortgage, and to do all other acts necessary to bring about a final distribution and settlement of the bankrupt estate. I am also of the opinion, that in a case where a creditor calls in question the validity of a mortgage held by another creditor, it is the duty of the said court to exercise jurisdiction over the questions involved, and, if necessary, to declare the mortgage null and void.

"In the case before me no such question is involved, and I see no reasons why the equity powers of this court should be exercised to do that which cannot change the rights of the parties interested, but which would have the effect of doing a positive injustice to the mortgage creditor, by subjecting his property to useless costs and expenses.

"It is, therefore, ordered that the complainant's bill be dismissed."

We have inserted the whole of this decree, because we think the court were not only right in dismissing the bill, but, with a single exception, we concur also in the principles and reasoning on which the learned judge founded his decision. The exception to which we allude is that part of the decree in which he expresses his opinion, that upon the ground of expediency the jurisdiction of the District Court of the United States over all the property of the bankrupt, mortgaged or otherwise, should be exclusive, so as to take away from the state courts any jurisdiction in such cases. Upon that subject it is not our province to decide, and we have no desire to express an opinion upon it. But in every other respect the decree conforms to the opinion delivered by this court, at the present term, upon the motion for a prohibition in the case *Ex parte The City Bank of New Orleans, in the matter of William Christy, assignee of Daniel T. Walden, a bankrupt*, v. *The City Bank of New Orleans*. In that case the opinion of this court in relation to the jurisdiction of the District Court in matters of bankruptcy has been fully expressed, and need not be repeated here; and according to the principles therein stated, the decree of the Circuit Court in this case must be affirmed.

Mr. Justice CATRON.

I think the adjudication in this case is in conflict with that made in the Circuit Court at New Orleans in *Christy against the City Bank;* and in support of which, a majority of my

brethren saw proper to express their views at a previous day during this term, in the unsuccessful application of the bank for a prohibition; but that the *cases are alike—and [*438 one cannot be maintained, and the other overthrown.

In that case the petition of the assignee set forth the entire legal grounds, why the District Court should annul the judgments in the state court, and pronounce the sale void.

1. That the property sold was given in by Walden, the bankrupt, as part of his effects.

2. That the bank had notice thereof, before the sale by the sheriff.

3. That the sale was void, being contrary to the Bankrupt Law, which operated to stay all further proceeding so soon as Walden's petition was filed, and was a bar to any further prosecution of the suit until an assignee should be appointed. That the sale with notice was a fraud upon the act of Congress, and the other creditors of Walden, by reason of the law, because the bank was endeavoring to obtain an illegal preference.

4. That at the sale the property was struck off in blocks, although consisting of different buildings, at two-thirds of its value: "All of which actings and doings are prohibited by law, and render said sale null and void."

5. That the sale was in other respects irregular, the legal formalities not having been observed.

6. That the mortgage was void for usury, because in effecting the loan the bank gave Walden bonds on the Second Municipality instead of money, and they were then at a discount at from twenty to twenty-five per cent.

To these allegations the bank answered:—

1. By plea that the District Court was not by law empowered to decide on the matters charged.

2. That all the matters and things set forth had already been decided by a court of competent jurisdiction—referring to the adjudications by name.

3. The defendant answers, and avers, that the mortgage was legal and valid, and given upon a full and adequate consideration.

4. That the order of sale was duly granted, and the writ thereon properly issued: and that the property described in the petition was lawfully seized, and after a compliance with all the legal formalities, was sold, and adjudicated to the defendants: that the price was fully paid by giving a credit—and that the property is held under an indefeasible title.

5. All the allegations in the petition not admitted, are denied, and a trial demanded of them.

This answer was excepted to as containing no legal grounds of defence; the question was adjourned, under the 6th section of the Bankrupt Law, to the Circuit Court to be there heard and determined. It stood in that court as on bill and answer: the answer was taken of course as true in all its *439] parts—the only question being whether *any legal ground of defence was furnished by the plea, supported by an answer, denying the alleged unfairness of the sale—presenting the same question in substance as did the case of *Harpending* v. *The Dutch Church*, in 16 Pet. By setting the case down on plea and answers, the proceedings in the supreme and inferior state courts were admitted of necessity to have been properly and fairly conducted; and the sale legally and fairly made. This was the undoubted aspect of the case as presented to and decided by the Circuit Court. Its decree, in the form of instructions to the bankrupt court, is, first—That the latter had full and ample powers to try all the questions presented in the assignee's petition: 2dly. That the sale made under the seizure by order of the state court was void; and that the bankrupt court should declare it so: 3d. That the bankrupt court had full power to re-try the validity of the mortgage and ascertain whether it was void for usury or otherwise: and this on the ground exclusively that the proceedings in the state courts were annulled by force of the bankrupt law, and the fact of Walden applying for its benefit.

Taking the petition and answer together, and a case existed in all its features like the present, on the title by execution; each being a fair and regular proceeding in the state court. One is suppressed—and the other maintained. And on what ground does the district judge assume to act contrary to the former adjudication? Because it was equitable and for the best interests of the estate to be distributed, in his judgment. The obvious meaning of which is, that he had power to overthrow the title or not, at his discretion; and that such discretion was the law of the case and the tenure of the title, according to the true intention of the Bankrupt Act. On this assumption are the two cases attempted to be reconciled; and on no other can they avoid direct conflict, even in appearance. In reality, the one title is as good as the other. The tendency of such a doctrine is too threatening to titles to be silently acquiesced in. Did Congress intend that the force and effect of judgments and executions in a state court, should depend on the sole discretion of a judge sitting in bankruptcy? Was it intended to discard the axiom, that unrestrained discretion in those that govern, is inconsistent

with the rights of those that are governed, be they of property or person? It is very difficult to suppose so; and as difficult to accommodate the construction of the act to such a supposition. It is declared, "that it shall not be construed to annul, destroy, or impair, any liens or mortgages, on property real or personal, which may be valid by the laws of the states respectively."

Here two liens are combined; one by mortgage, the other by execution levied. In *Christy* v. *The City Bank*, as already stated, that by mortgage was recognized as a right protected by the act, but to be administered in the bankrupt court only; that by execution was *pronounced void. This decision the court below was asked to follow out, in the case before us, and refused. [*440

By the execution levied, the lien "was valid by the laws of the state"—in the words of the saving clause; the remedy by seizure created the right; to annul, or to stay the execution, impaired a right, excepted out of the act. Since the opinions were delivered in the ex parte application of the City Bank, we have in effect so held at the present term, in *Waller* v. *Best*.[1]

In making exceptions in favor of liens created by judgment and execution, Congress was governed by practical considerations. The states usually were large, the bankrupt courts in many of them far off from the creditors, the debts owing by the bankrupt small in amount to a great extent; for these recoveries would be had in the inferior courts and before magistrates; the property would be seized by execution, and he the debtor be driven into bankruptcy; this step might be taken secretly. The officer having possession of the property had to dispose of it according to the commands of the writ, and make return to the state tribunal; a return that the debtor had applied for the benefit of the bankrupt law would not be a legal return, as I have held, and always supposed; and that a decree declaring the party a bankrupt, would not alter the case; as in either, the lien would be not only impaired, but destroyed where the levy alone gave it, as is the case in many instances. To drive the small creditor into the bankrupt court to establish his demand and effectuate his lien, would often have been worth more in trouble and expense than the debt, and in the mean time the property, being abandoned by the officer, and not taken possession of by the assignee, would in many instances perish. These facts were too palpable for Congress to overlook. To protect such liens,

[1] *Ante*, p. 111.

I take it the exception was a compromise between the opponents and friends of the bill; the one side supporting rights secured by the state laws, and the other seeking to adopt a different rule under the Constitution of the United States, in regard to the relation of debtor and creditor.

In many cases the bankrupt might owe debts in other states than that where he would be declared bankrupt; then other difficulties would arise on executions being levied in the foreign jurisdiction, to which the powers of the bankrupt court could not extend. In all the cases enumerated the assignee had given to him the same powers the bankrupt previously had, to sue and defend, and no material difficulty could arise (or has arisen) in adjusting the claims in the state courts, to which the assignee was bound to apply.

That a mortgage can be foreclosed in the bankrupt court, and the lien given by it be preserved there, I have never doubted, if the jurisdiction of a state court had not attached, and was not ousted by the proceedings in bankruptcy.

For the foregoing reasons, I think the court of Louisiana *441] was *mistaken when it assumed to have power to suppress the sale made by the sheriff, or to let it stand, at its discretion.

The decree is deemed entirely proper; nor would the reasons for it have been noticed had not my brethren adopted them to the extent above; and with which adoption I cannot concur.

CHARLES H. CARROLL, COMPLAINANT, *v.* ORRIN SAFFORD, TREASURER OF THE COUNTY OF GENESEE, IN THE STATE OF MICHIGAN, DEFENDANT.

When the purchaser of land from the United States has paid for it, and received a final certificate, it is taxable property, according to the statutes of Michigan, although a patent has not yet been issued.[1]

[1] APPLIED. *County of Cass* v. *Morrison*, 28 Minn., 260. FOLLOWED. *Levi* v. *Thompson*, 4 How., 19. CITED. *Doe* v. *Eslava*, 9 How., 447; *Cady* v. *Eighmey*, 54 Iowa, 618; *Pac. Coast Mining &c. Co.* v. *Spargo*, 8 Sawy., 647.

Upon entry and payment and receiving a certificate thereof, the purchaser becomes the equitable owner of the land purchased of the government, and such land is taxable by the state. *Union M. & M. Co.* v. *Dangbey*, 2 Sawy., 450, 455; *People* v. *Shearer*, 30 Cal., 648; *People* v. *Fribie*, 31 Cal., 146; *People* v. *Cohen*, Id., 210; *People* v. *Crockett*, 33 Cal., 150; *Astrom* v. *Hammond*, 3 McLean, 107; *Carroll* v. *Perry*, 4 Id., 25. But if acquired from the government after the termination of the time within which assessments of taxes are made, it is not liable to taxation until the following year. *Des Moines, &c. Co.* v. *Polk County*, 10 Iowa, 1; *Tallman* v. *Butler*, 12 Id., 531. When the United States government took possession of land in 1861, and continued

Carroll v. Safford.

Taxation upon lands so held is not a violation of the ordinance of 1787, as an "interference with the primary disposition of the soil by Congress," nor is it "a tax on the lands of the United States." The state of Michigan could rightfully impose the tax.

It was competent for the state to assess and tax such lands at their full value, as the absolute property of the holder of the final certificate, and in default of payment, to sell them as if he owned them in fee.[2]

In case of controversy, a court of equity is the proper tribunal to prevent an injurious act by a public officer, for which the law might give no adequate redress, or to avoid a multiplicity of suits, or to prevent a cloud from being cast over the title.[3]

THIS case came up on a certificate of division from the Circuit Court of the United States for the district of Michigan, sitting as a court of equity.

The complainant resided in the state of New York, and in 1836 purchased from the United States three thousand five hundred and forty-nine and seventy-one one-hundredths acres of land in Genesee county, in Michigan. The lands were paid for in the way usually pursued by purchasers of the public domain, subject to private entry and sale. According to the laws of Congress, and the practice of the land officers, an individual wishing to purchase a tract of land makes application, in writing, to the register, specifying, in the application, the particular tract sought to be bought. The register examines and ascertains whether it is subject to entry. If it be, he gives to the applicant a memorandum, addressed to the receiver, stating the application, and that the land is subject to entry. This is taken to the receiver, and the money there paid. The receiver executes receipts in duplicate, specifying the particular tract sold, and the price paid for it. One of these is delivered to the purchaser, the other to the register; and this last is transmitted to the office at Washington as a

to hold and occupy it until 1865, it was held liable to taxation during the time it was so held and occupied by the government. *Speed* v. *St. Louis County Court*, 42 Mo., 382. Where the fee in the United States is assessed for state taxes, the assessment is utterly void. *Wright* v. *Cradlebaugh*, 3 Nev., 341.

[2] APPLIED. *McWilliams* v. *Withington*, 7 Sawy., 206. FOLLOWED. *Witherspoon* v. *Duncan*, 4 Wall., 219. CITED. *Wisconsin Cent. R. R. Co.* v. *Taylor Co.*, 52 Wis., 56.

[3] It is said that equity entertains a suit to remove a cloud that is upon a title for the good of both parties. *Eldridge* v. *Smith*, 34 Vt., 484; *Hodges* v. *Griggs*, 21 Vt., 280; and there is now no doubt of its power so to do. *Pierce* v. *Webb*, 3 Bro. Ch., 16 *n.*; *Hayward* v. *Drinsdale*, 17 Ves., 111; *Petit* v. *Shepherd*, 5 Paige (N. Y.), 493; *Fish* v. *French*, 15 Gray (Mass.), 520; *Sherman* v. *Fitch*, 98 Mass., 59; but it will not usually entertain jurisdiction except when the complainant is in possession. *Sullivan* v. *Finnegan*, 101 Mass., 447; *Clouston* v. *Shearer*, 99 Mass., 209; *Bunce* v. *Gallagher*, 5 Blatchf., 48; *Woods* v. *Monroe*, 17 Mich., 238; and not when out of possession. *Herrington* v. *Williams*, 31 Tex., 448; *Polk* v. *Pendleton*, 31 Md., 118; *Barron* v. *Robbins*, 22 Mich., 35; *Contra*, *Branch* v. *Mitchell*, 24 Ark., 431; *Almony* v. *Hicks*, 3 Head (Tenn.), 89; *Thompson* v. *Lynch*, 29 Cal., 189. And see *Stewart* v. *Meyer* 54 Md., 468.

voucher against the receiver. The register then makes out a final certificate, specifying the sale, and that the purchaser is
*442] entitled to a patent. It is competent for the *purchaser to demand and take this certificate from the register; but, in practice, it is rarely done. Almost invariably the register retains it until he makes his monthly returns, when he transmits this certificate to the office at Washington, and on it (if the government confirm the sale) the patent issues.

In this case, the register, immediately after the entry of the land, transmitted to the proper office at Washington the patent certificates, as the basis of the issue of patents for the land so entered by the complainant.

The complainant, previous to the issuing of the patents for the lands, did not enter into actual possession of them, nor exercise acts of ownership over them.

Patents were issued for this land by the United States on 12th August, 1837, and not before. They were dated on that day, and were shortly after their date transmitted to the register of the land office at Ionia, in Michigan, and subsequently were delivered to the complainant.

The delay in the issuing of the patents, after the entry of the land by the complainant, was not at the request or in any way by the procurement of the complainant.

The patents declare, that "the United States give and grant" the lands to the patentee.

In the year 1837, and before the date and issue of the patents, these lands were assessed at their full value, and as if owned by the complainant in fee-simple, for township, county, and state taxes, by the proper local officers of Michigan, (having full knowledge that the patents for the same had not issued,) which taxes were not paid by the complainant.

The assessment rolls describe the land as owned by the complainant absolutely, and without any reservation or qualification. The valuation attached to it purported to be its entire value, as an absolute and unconditional estate in fee-simple.

By the laws of Michigan, applicable to this part of the case, it is made the duty of the county treasurer to sell such lands as have been taxed, and the taxes on which have not been paid on giving a certain notice. The defendant being then, and now, a citizen of the state of Michigan, as county treasurer of Genesee county, did so sell the lands described in the bill of complaint.

Two years are allowed by law for the person claiming title to the lands to redeem, by paying to the treasurer the tax and charges, and interest at the rate of twenty per cent. per

annum. If not redeemed, the land was to be conveyed to the purchaser in fee-simple.

The two years, the period allowed for redemption, had not expired at the time of filing the bill of complaint. The bill prayed that the assessment and sale might be declared illegal, and declared void, and that the treasurer of the county might be enjoined from conveying the lands to the purchasers at the tax sale, for other relief.

*The bill was filed in 1842, and was taken *pro confesso*. A motion was then made for a decree according to its prayer, upon which the following questions arose, upon which the opinions of the judges were opposed: [*443

1. Whether the statutes of the state of Michigan did, in fact, authorize the assessment and sale of the lands in question, and whether said statutes were intended to direct the assessment for taxation of lands of the United States before the patents for them had been executed by the officers of the United States?

2. Whether the lands in question were, before the date and execution of the patents for them, subject to taxation at all, by the state of Michigan?

3. Whether, if they were subject to taxation by the state, before the execution of the patents for them, it was competent to assess and tax and sell them, as the absolute property of the complainant, and at their full value, as if he owned them in fee?

4. Whether the remedy by bill in equity, and the relief sought, are proper?

The statutes of Michigan, referred to in the above questions, were the following:

Law of April 22d, 1833.

"Sect. 1. Be it enacted by the legislative council of the territory of Michigan, that the taxes hereafter to be levied in this territory, shall be assessed, levied, and paid in the manner hereinafter mentioned, upon a valuation of real and personal estate, including property and stock in any bank, insurance company, or other incorporation, to be made as hereinafter prescribed.

"Sect. 2. The assessors of each township may divide their townships, by mutual agreement, into such number of districts, to be called assessment districts, as they may deem convenient, not exceeding the number of assessors in any such township; and in every year, between the 15th day of April and the 1st day of May, shall individually, in their assessment districts, according to the best evidence in their power, make out a list or schedule of all the taxable property

in the same, and bring the said lists or schedules together, and jointly value the property named in each, and set down in their assessment-roll the value of buildings and lands in such township, owned or possessed by any person residing in such township, or any banking or insurance company, or other incorporation situated in such township, opposite the name of such person or incorporation; and shall also ascertain and set down in their said assessment-rolls, in like manner, the value of all the personal estate of every such person; and in case any person, not satisfied with such valuation, shall make oath before such assessor, or either of them, who are hereby authorized to administer such oath, that the value of his or her real or personal estate does not exceed a certain sum, specifying *444] the same, then, and in every such case, the assessors shall value such *real and personal estate at the sums specified in such affidavit, and no more; and every person liable to be taxed for any personal estate as aforesaid, shall be taxed for the same in the township where such person shall reside at the time of making such assessment; and the assessors shall also ascertain what lands are situated in their townships, not owned by persons residing in such townships, and shall, in their assessment-rolls, separate from the assessments made the estates of non-residents, and designate such land in the following manner: if the estate be a patent or tract of land of the subdivision of which the assessors cannot obtain correct information, they shall enter the name of the patent or tract, if known by any particular name, without regarding who may be the owner thereof; and if such tract be not known or designated by any particular name, they shall state by what other land the same is bounded, and shall set down the quantity of land contained therein, and the value thereof, in the proper columns for that purpose; and the assessors shall complete their assessments on or before the 1st day of May in every year, and make out a fair copy thereof to be left with one of the board, and thereupon cause notices to be put up at three or more public places in their township, setting forth that they have completed their assessment, and that a copy thereof is left with one of them, naming him, where the same may be seen and examined by any of the inhabitants during ten days; and that at the expiration of the said ten days, they shall meet on a certain day, at a place in the said notice to be specified, to review their said assessments, on the application of any person conceiving himself aggrieved; and it shall be the duty of the said assessors, with whom the said assessment-roll shall be left as aforesaid, during the said ten days, to submit the said roll to the inspection of any person who shall

apply for that purpose; and at the said time and place, the said assessors shall meet, and, on application of any person conceiving himself aggrieved, shall review the said assessment, and may alter the same, on sufficient cause being shown, to the satisfaction of the said assessors, or a majority of them; and the assessors, or a majority of them, shall make oath or affirmation, and attach the same to the said assessment-roll in the following, or other equivalent form, to wit: 'We do severally swear (or affirm) that the sums at which property is assessed in the foregoing assessment-roll, are, according to our best judgment, the fair cash value of such property.'

"Sect. 9. The person in possession of any real estate, at the time any tax is to be collected, shall be liable to pay the tax imposed thereon; and in case any other person, by agreement or otherwise, ought to pay such tax, or any part or proportion thereof, the person who shall pay the same shall and may recover the amount from the person who ought to have paid the same; and all taxes upon any real estate shall be a lien thereon, and shall be preferred in payment to all other charges; and all taxes upon any personal *estate shall, [*445 in case of the death or bankruptcy of the person taxed, be preferred in payment to all other demands.

"Sect. 14. Any tax heretofore laid by virtue of any law of this territory, or to be laid by virtue of this act, upon any real estate, and the interest and charges thereon, shall be a lien upon the same real estate, until the same tax, interest, and charges, shall be paid or recovered, notwithstanding the same real estate may have been divided or aliened, in the whole or in part; and whenever such tax, and the interest aforesaid accruing thereon, shall remain unpaid for two years from the 1st day of May following the year in which any such tax was or shall be laid, the treasurer of the proper county shall cause so much of the land charged with such tax and interest, to be sold at public auction, at the court-house of the county where such lands are situated, to the highest bidder, as shall be necessary to pay the said tax and interest, together with all charges thereon, first giving at least four months' notice of the time and place of sale, by advertisement, posted up in three or more public places in said county, and also, by causing a copy thereof to be published in one or more of the public newspapers printed or in circulation in said county."

"Sect. 15. On the day mentioned in the said notice, the treasurer shall commence the sale of the said lands, and continue the same from day to day, until so much thereof shall be sold as will pay the taxes, interest, and charges due, assessed and charged thereon as aforesaid; and the treasurer shall give to

the purchaser or purchasers of any such lands, a certificate, in writing, describing the lands purchased, and the sum paid therefor, and the time when the purchaser will be entitled to a deed for the said lands; and if the person claiming title to the said lands, described in the said certificate, shall not, within two years from the date thereof, pay the treasurer, for the use of the purchaser, his heirs or assigns, the sum mentioned in such certificate, together with the interest thereon, at the rate of twenty per cent. per annum, from the date of the said certificate, the treasurer shall, at the expiration of the said two years, execute to the purchaser, his heirs or assigns, a conveyance of the lands so sold, which conveyance shall vest in the person or persons, to whom it shall be given, an absolute estate in fee-simple, subject to all the claims which the territory of Michigan shall have thereon, and the said conveyance shall be conclusive evidence that the sale was regular, according to the provisions of this act; and every such conveyance to be executed by the treasurer, under his hand and seal, and the execution thereof witnessed and acknowledged in the usual form, may be given in evidence and recorded, in the same manner, and with like effect, as a deed regularly acknowledged by the grantor may be given in evidence and recorded."

*446] *_Nelson_, attorney-general, for the complainant.
Norvell, for the defendant.

Nelson, for complainant.

A fundamental proposition, and one on which the whole equity of the complainant's case rests, is, that, until the issue of the patent, the fee of the land remains in the United States; that, after payment of the purchase money by the applicant, and the receipt of it by the officers of the United States, the United States may still decline, on various grounds, to perfect his title by the execution of a patent; that he cannot know, after purchase, and before the patent issues, whether he is to receive an absolute conveyance or not; that nothing but the patent passes the fee, and that, before its issue, the purchaser has but a qualified and contingent estate in the lands.

These principles are involved in the following decisions: _Stringer et al._ v. _Lessee of Young et al._, 3 Pet., 320, 344; _Boardman et al._ v. _Lessees of Reed & Ford et al._, 6 Id., 328, 342; _Bagnell et al._ v. _Broderick_, 13 Id., 436, 450; _Wilcox_ v. _Jackson_, Id., 498, 511, 516; _Brush_ v. _Ware_, 15 Id., 93, 107, 108; _Stoddart_ v. _Chambers_, 2 How., 284, 318.

I refer also to the opinions of the attorney-general, and the practice of the land-office, as found in the 2d volume of Public Land Laws, Instructions and Opinions, published in 1838, not only to show that the sale is frequently cancelled by the government for a great variety of reasons; and that "the issuing a patent is not so purely a ministerial act as to follow a patent certificate as a matter of course," but also that it has been the settled policy of the government to regard lands thus situated as exempt from all taxation, and that "the legal title remains in the government until the patent issues." See pp. 4, 14, 24, 25, 39, 76, 80, 84, 87, 160, 213, 214, and 1040; and act of Congress, 12th January, 1825, chap. 318.

The payment of the money by an applicant for a part of the public domain, is a proposition for a purchase. The register and receiver do not act judicially in admitting the application and receiving the money; their acts may be overruled, and the money returned, and a patent be refused for various reasons; and the fate of the application cannot be known by the purchaser until the patent be executed. Till then his title is imperfect, and his estate contingent. In ordinary cases between private individuals, where a legal contract for the sale of lands has been entered into, equity considers the vendee as the true owner of the lands, because the vendor is bound to convey by virtue of a contract, which can be enforced in a court of equity, and the obligation is mutual, as is also the remedy. 2 Story Eq., 98, 99, § 790. Not so in regard to applications for the purchase of the public lands. But even if this were, it would not affect the present argument.

Assuming, then, that at the time of the assessment of the lands *described in the bill, the fee of them was in the United States, the complainant's counsel insist— [*447

1. The statutes of Michigan did not embrace the lands in question, and were not intended to authorize their assessment.

The statute directed the assessment of lands "owned or possessed by any person residing in the township."

This part of the statute is inapplicable, for the complainant is and was a non-resident; and the case shows that he was not in the actual possession of the land.

The statute then directs the lands not "owned" by residents to be separately assessed by the description of the tract without regard to the name of the "owner."

The assessment is to be according to "the fair cash value" of the lands; that is, of the fee-simple or absolute estate in the lands.

The assessment of real estate is to be according to its entire value, as in the case of personalty. The word "owner" is

attached to both kinds of property as descriptive of the estate or interest to be taxed.

The taxes are made a lien upon the lands.

If not paid, and if the land be not redeemed after sale for non-payment, the treasurer of the county in which the lands lie is directed to execute to the purchaser "a conveyance of the lands so sold; which conveyance shall vest in the person or persons to whom it shall be given an absolute estate in fee-simple, subject to all the claims which the territory (state) of Michigan shall have therein; and the said conveyance shall be conclusive evidence that the sale was regular according to the provisions of this act."

All the provisions of this statute are intended to operate upon the unencumbered fee of the lands assessed. This furnishes the measure of value—this regulates the conveyance of the purchaser.

Lands owned by the United States are not subject to taxation. The fee of these lands was in the United States at the time of the assessment. It is not to be supposed that there was any intention of taxing the property of the United States. This assessment is upon the fee. The conveyance operates as a transfer of the fee. How, then, can it be argued that the statutes intended to embrace these lands?

It does not aid the argument in this branch of it to say, that the complainant had a valuable and taxable interest in these lands.

This may for the present be conceded. Our answer to it is, that the statute does not profess to tax such interest. It taxes the owner of the land and sells the fee if the tax be not paid.

2. The lands in question were not, before the date and execution of the patents for them, subject to taxation at all by the state of Michigan.

The proposition refers to the date and execution of the patents. It is not denied that, so soon as executed, they *448] become operative; *and that the transmission of them to the register is in law a delivery to the purchaser through him as the agent of both parties.

The 4th article of the ordinance of 1787 for the government of the territory north-west of the river Ohio provides, that "the legislatures of those districts or new states shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchasers. No tax shall be imposed on lands the property of the United States; and in no case shall non-resident proprietors be taxed higher than residents."

It has been shown that, after the receipt of the receiver and the transmission of the patent certificate, the patent may still be refused.

In point of fact this frequently occurs. Patents were, in several instances, refused to the complainant, and his certificates of purchase cancelled. In the case of *Ostrom* v. *The Auditor-General of Michigan*, which arose in the Circuit Court for the district of Michigan, in 1842, it appeared that, out of about one hundred certificates, fourteen were never allowed, and patents for them had been refused. The lands embraced in those certificates have been sold and conveyed in fee-simple by Michigan, by virtue of assessments on them as the property of Ostrom, to whom the United States refused to convey. The United States either retain these lands, or have conveyed them to third parties. These facts illustrate the principle; they may again occur. Is not this an interference with the primary disposal of the soil by the United States? If so in any degree, the amount of it does not affect the argument; and if such may be the consequence of admitting the operation of the principle, it is a conclusive argument against its allowance at all.

Again: It is provided that "no tax shall be imposed on lands the property of the United States."

Mark the phraseology. It is not that no tax shall be imposed on the interest or estate of the United States in any lands, but that lands, while they remain the property of the United States, shall not be taxed at all by the states. This is the plain import of the terms. The question is then narrowed to this: When do the lands embraced in the public domain cease to be the property of the United States? This question, we think, has been fully answered by the authorities already cited.

The reasoning of the court in the case of *Wilcox* v. *Jackson*, is strong and clear upon this question:—

"We think it unnecessary to go into a detailed examination of the various acts of Congress," say the court, "for the purpose of showing what we consider to be true in regard to the public lands, that with the exception of a few cases, nothing but a patent passes a perfect and consummate title." 13 Pet., 516.

And again:—

*"A much stronger ground, however, has been taken [*449
in argument. It has been said that the state of Illinois has a right to declare by law, that a title derived from the United States, which, by their laws, is only inchoate and imperfect, shall be deemed as perfect a title as if a patent had

issued from the United States; and the construction of her own courts seems to give that effect to her statute. That state has an undoubted right to legislate as she may please in regard to the remedies to be prosecuted in her courts, and to regulate the disposition of the property of her citizens by descent, devise, or alienation. But the property in question was a part of the public domain of the United States. Congress is invested by the Constitution with the power of disposing of and making needful rules and regulations respecting it. Congress has declared, as we have said, by its legislation, that in such a case as this a patent is necessary to complete the title. But in this case no patent has issued; and, therefore, by the laws of the United States, the legal title has not passed, but remains in the United States. Now, if it were competent for a state legislature to say that, notwithstanding this, the title shall be deemed to have passed, the effect of this would be, not that Congress had the power of disposing of the public lands, and prescribing the rules and regulations concerning that disposition, but that Illinois possessed it. That would be to make the laws of Illinois paramount to those of Congress in relation to a subject confided by the Constitution to Congress only. And the practical result in this very case would be, by force of state legislation, to take from the United States their own land, against their own will, and against their own laws. We hold the true principle to be this: that whenever the question in any court, state or federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that, whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to state legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States." 13 Pet., 516, 517.

The act of Congress (15 June, 1836) admitting Michigan into the union, is even stronger in its terms than the ordinance of 1787. It is as follows:

"Sect. 4. And be it further enacted, that nothing in this act contained, or in the admission of the said state into the union as one of the United States of America, upon an equal footing with the original states in all respects whatever, shall be so construed or understood as to confer upon the people, legislature, or other authorities of the said state of Michigan, any authority or right to interfere with the sale by the United States, and under their authority, of the vacant and unsold lands within the limits of the said state; but that the subject

of the public lands, and the interests which may be given of the said *state therein, shall be regulated by future [*450 action between Congress, on the part of the United States; and the said state of Michigan shall, in no case, and under no pretence whatsoever, impose any tax, assessment, or imposition of any description, upon any of the lands of the United States within its limits."

This exemption from taxation of the lands of the United States, and the prohibition of the states in which they are located to interfere with their disposal, were designed, as they were calculated, to facilitate their sale, and to hold out inducements to purchasers, and enter, as one of its elements, into the price of such lands; and as, from the very nature of the contract of purchase, a buyer cannot prudently improve, or expend money on the land, before his title is consummate. All the principles of equity, as well as of law, concur in securing to the citizen an exoneration from the burdens of state assessment, until the moment that he may be recompensed by the enjoyment of the profits of the land purchased, and that is, when his title is perfected by patent.

The legislature of the state of Michigan illustrates this view. By her act providing for the disposition of her university lands, she has provided, that the land held by a certificate of purchase from the state, shall be taxed as personal property; that such certificate shall enable the purchaser to support an action of trespass on the lands, and entitle him to the immediate possession thereof. Laws of Michigan, 1844, No. 68, sect. 19. And it has been decided by her courts, that the holder of a certificate of purchase from the United States cannot maintain ejectment on it. This I learn from the profession, for there are no reports published of their decisions. The same doctrine is the settled law of Ohio. 1 Ohio, 813, 814; 6 Id., 165; 7 Id., 151 and 252. In Illinois, the holder of certificate of purchase may maintain ejectment, &c., by virtue of positive statutory enactment. Revised Laws, p. 199.

But we think that, independent of these statutes, the claim of the state to tax these lands is indefensible.

The property of the United States is not taxable by the several states.

The subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are exempt from taxation. *McCulloch* v. *The State of Maryland*, 4 Wheat., 316. The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. *Providence Bank* v. *Billings & Pitman*, 4 Pet., 563.

These principles exempt the United States and their property from taxation by the states. See *Weston et al.* v. *City Council of Charleston*, 2 Pet., 449.

The exemption extends to the lands in controversy, unless the inchoate title acquired by the applicant for the purchase of them subjects them to taxation.

*451] *There certainly is no express legislation to this effect.

How does the case stand on general principles? In order to place it in the most unfavorable light for our argument, let the situation of the complainant be assimilated to that of a vendee after contract, but before deed, who has a perfect right to a conveyance. Before conveyance actually made, who is to pay taxes on the lands agreed to be conveyed?

Taxation is a legal question. Taxes are levied against the legal owner. They are prescribed by express statutes. Legal rights are alone looked to in the assessment and levy of taxes.

Under the old credit system, lands were confessedly exempt from taxation until after the patent issued. A purchaser of them, even before the payment of the money, was as much an equitable owner as now. He was styled the purchaser of the land so soon as he made the payment of twenty per cent. and received his certificate.

Look at the absurdity of the opposite doctrine: If a tax assessor is to inquire into the equitable rights and interests of parties, then when money has been agreed to be laid out in lands, it should be assessed and returned as lands, and *vice versa*, in regard to lands contracted to be sold.

This very point arose in the case of *Wilson's Exec.* v. *Tappan*, 6 Cond. (Ohio), 80, 7 Hamm. (Ohio), 172, and it was there decided, that the vendor was bound to pay them; and that, if not paid, the warranty in the deed of freedom from encumbrances would indemnify the vendee against them.

The patents issued by the United States for the public lands contain the words "give and grant." These words imply a warranty. See Cai. (N. Y.), 188; 7 Johns. (N. Y.), 258; 8 Cow. (N. Y.), 36; 1 Co., 884 a; 4 Kent Com. (ed. of 1844,) 474, and cases there cited. If the complainant can be compelled to pay these taxes, he has a right to be reimbursed by the United States.

The public domain, as such, cannot be taxed by the states. The lands of the complainant were not severed from it until conveyed to him by patent. After he had paid his money to the receiver on his application to purchase the lands, he could have been personally assessed for such sum, if he had been within the jurisdiction of Michigan. His property was not

diminished by such a payment; for, if the patent were refused, the money would be refunded. If actual possession had been taken of the lands, inasmuch as such possession is protected by the laws of the state, its value might be the subject of a personal tax. All this may be granted, and yet nothing will have been conceded tending to establish the right of the state to impose a tax upon the land itself, which does not constitute a charge against the purchaser personally, but is to be satisfied out of the land and by a sale of it. This is the character of the present tax, and must be of any land-tax. Such tax is a proceeding *in rem*. It cannot be apportioned and split up, so as to sell the interest of *the purchaser in the [*452 land, and transfer an interest in it, without the assent or co-operation of the United States, and yet not interfere with the absolute rights of property and control belonging to the latter.

The federal government, though limited in the subjects of its powers, is sovereign in their exercise; and in all cases where its powers are exclusive, or where the exercise of a concurrent power by a state conflicts with the beneficial and perfect exercise of it by the United States, the federal authority is supreme. The extent of the alleged interference is not a question to be considered in determining its invalidity.

The case of *Dobbins* v. *Commissioner of Erie Co.*, 16 Pet., 435, applies this principle to a question of taxation. It also shows clearly, that this is a tax on the property assessed, and not a personal charge, (p. 446,) and that such a tax, when it acts upon the property or agents of the United States, is entirely illegal.

The public domain is exclusively within the control of the United States, and is an important source of its revenue. The "perfect execution" of the power of its sale and management is certainly interfered with by the acts complained of, and the principles established in the above case (p. 447) control the present.

3. If the lands were subject to taxation to any extent by the state of Michigan, before the execution of the patents for them, it was not competent to assess, and tax, and sell them as the absolute property of the complainant, and at their full value, as if he owned them in fee.

That such is the effect of the law complained of, will not be denied. That it is illegal, we think is already shown. The fee of the United States cannot be divested by the legislation of the state. The state could only give the purchaser at the tax-sale an equitable interest, for the complainant himself had no other.

4. The case is properly cognisable in equity, and the relief sought is appropriate.

As to the principle on which equity exercises its jurisdiction, there are equitable rights and legal rights incident to property.

Courts of law will not take notice of mere equitable rights; they can be enforced only in equity, and hence arises the exclusive jurisdiction of courts of equity.

But in cases where legal rights are defined and settled by the rules of law, then equity follows the law.

The right to tax, and the mode of taxation, are defined by statute, and the construction of statutes is the same at law and in equity.

In support of these principles, I refer to 1 Story Eq., 14, 15, 16, 17, 72.

Our rights, then, are settled by the law, and will be construed in the same manner in courts of law and of equity. *453] Indeed, is it not manifest that the legality or illegality of the tax must be decided in *the same way by courts of law and equity? Can that be a valid assessment in equity which is invalid at law, where there can be but one legal mode of assessment in any case? Why, then, if we rely upon our legal rights, do we ask the interference of equity?

We come for the remedy. The most important source of jurisdiction of an equity court is that which is concurrent with courts of law. Rights in each court are the same, but a party is at liberty to ask the aid of a court of equity to protect him in his legal rights on account of the better remedy which results from the modes of administering relief in equity; and equity will interfere in all cases where the remedy at law is not plain, adequate, and complete. See 1 Story, 93, 94; 2 Id., 155, 168; 3 Pet., 215.

When this is done, the rights of parties in the subject-matter of the litigation are construed as at law. The remedy is according to equity, and it will be granted in all cases, with the simple condition, that a party who asks it shall do equity himself.

What is meant by this? Not the wild notions as to natural equity which were suggested on the argument below; but simply, that where legal and conscientious matters are mingled in the same transaction with those of a fraudulent and illegal character, a party shall discharge the former part of the contract before he will be relieved as to the latter. 1 Story Com., 77.

This maxim has here no application, until it be shown that a part of these taxes are legal and proper.

The sole point that is left for discussion is, as to the reasons which render the remedy at law inadequate, and require the interference of this court. These reasons are the following:

1st. To prevent a cloud being cast over the complainant's title. See following authorities: *Corporation of Washington* v. *Pratt*, 8 Wheat., 682; *Burnet* v. *City of Cincinnati*, 3 Ohio, 86; *Gouverneur* v. *City of New York*, 2 Paige (N. Y.), 435; *Pettit* v. *Shepherd*, 5 Id., 493, 501; *Hamilton* v. *Cummings*, 1 Johns. (N. Y.) Ch., 517; *Ward* v. *Ward*, 2 Hayw. (N. C.), 226; *Leigh* v. *Everhart, Exec.*, 4 Munf. (Va.), 380; *Grover* v. *Hugel*, 3 Russ. Ch., 432; Harrington's Rep., 8; *Ostrom* v. *Bank of the United States*, 5 Pet. Cond., 759.

2d. To prevent a multiplicity of suits and unnecessary litigation. 1 Story, 82, 83, 84; 6 Paige (N. Y.), 88. Better for both complainant and the state that the matter should now be decided.

3d. To restrain public officers from doing an illegal act. If the act be consummated, there may be no redress; equity, therefore, interferes to prevent the consequent failure of justice by enjoining the act. *Osborne* v. *Bank of the United States*, 6 Paige (N. Y.), 88; 2 Kent, 339, note, 3d ed.

The claims of the state to tax lands in the situation of those described in the complainant's bill are exceedingly inequitable. The lands are not actually nor theoretically separated from the public *domain. The purchaser has taken no [*454 possession of them, nor exercised any acts of ownership over them. A tax on the unimproved and vacant lands of non-residents is generally inequitable, and, at best, oppressive and onerous. See 2 Kent Com., 332. Just so soon as an individual proposes to buy the lands of the United States, the agents of the state rush in and fasten on it, and demand, on pain of forfeiture of the whole of it, that he pay taxes on it for an interest which he does not own, and which he cannot know he will receive, until, perchance, the land has been sold and lost.

Norvell, for defendant.

The questions of difference involved in this case are of deep importance to the state of Michigan, affecting as they do, her right to tax lands as soon as they are purchased, and paid for, from the United States, and obliging her, if they should be decided adversely to the defendant, to refund to individuals a large amount of money received into her treasury from the taxation of lands so situated.

1. The first question is, "whether the statutes of the state of Michigan did, in fact, authorize the assessment and sale of the lands of the complainant, and whether said statutes were

intended to direct the assessment for taxation of lands of the United States before the patents for them had been executed by the officers of the United States?"

The statutes of Michigan did and do authorize the assessment, taxation, and sale of lands for non-payment of the taxes, situated as those of the complainant were. The lands of the complainant had, prior to their assessment, been purchased from the United States, and he had received the regular certificates of purchase and payment from the receiver of public moneys. These lands were not, it is believed, sold for the taxes, before the patents were dated and executed. But whether they were, or not, is not material to the right decision of this cause.

The act passed by the legislative council of the territory of Michigan, and approved on the 22d of April, 1833, authorizes, in its first section, the assessment, levy, and collection of taxes, upon the valuation of real and personal property, to be made as prescribed in the subsequent sections of the same act.

The 2d section directs the proper officers to ascertain, assess, and make out a separate and distinct list of the lands situated in their respective townships, "not owned by persons residing in such township," and prescribes the manner in which the lands of non-residents shall be described and entered in the assessment-rolls.

This is precisely the same language used with regard to the lands owned by non-residents, and assessed for taxation, in the laws of Michigan, passed by her legislature, after she became a state.

The 14th section of the act of April 22, 1833, provides that whenever the taxes on lands of non-residents, as well as resi-
*455] dents, *shall remain unpaid for two years, the treasurer of the proper county shall cause so much of the land charged with such taxes and interest, as shall be necessary to pay the same, to be advertised and sold for that purpose, giving at least four months' notice, in certain public newspapers, of the time and place of sale.

The long notice directed to be thus given, before the sale could take place, affords conclusive evidence that the lands of non-residents living out of the state were included in the terms and provisions of the act directing the assessment, taxation, and sale of real and personal estate, if the taxes were not duly paid thereon.

The succeeding section of the law prescribes the time within which, and the conditions on which, the lands in question, thus assessed, taxed, and sold for the taxes, might be redeemed by the owners.

I refer to the act of April 22, 1833, at page 88 of the Session Laws of 1833, to be found here in the Department of State.

The laws of Michigan make no distinction between the lands for which patents have not been issued and those for which they have been issued, in providing for their assessment, taxation, and sale for the non-payment of taxes. As soon as the lands are purchased of the United States, the money paid for them, and the duplicate receipts and certificates of purchase signed, and issued by the receivers of the public moneys at the land-offices within the state, they become, according to the invariable interpretation of the tax laws of that state, and the usage in their execution, objects of assessment, taxation, and sale.

An act was passed by the legislative council of Michigan, and approved December 30, 1834, "making the certificates of the purchase of public lands" evidence of their possession by the persons holding such certificates of purchase of such lands, as against any person or persons not having a better title than actual possession. This act illustrates the general light in which the duplicate receipts or certificates of the purchase of public lands, signed by the receivers, were viewed by the legislative authorities of Michigan. The statute remains unrepealed. And I am not aware that any of the courts of Michigan have decided, "that the holder of a certificate of purchase from the United States cannot maintain ejectment upon it." On the contrary, the very law making these certificates evidence of possession was intended to authorize the holder to maintain action of ejectment in any of her courts, and it expressly provides that they shall be evidence in such courts that possession is in the person holding the certificate. And, as secretary of the legislative council when the act was passed, I remember it was maintained in debate, that lands which had been purchased, and for which certificates of purchase from the United States had been issued at the land-offices, were as lawfully and rightly the subjects of taxation as if the patents had been issued from the proper department at Washington. *See the Session Laws of Michigan, passed at the second session of legislative council in 1834, pp. 88, 89. [*456

The act of the legislature of the state of Michigan, approved April 19, 1839, makes it the duty of the several county treasurers to collect all non-resident taxes assessed prior to 1838, remaining unpaid, as if the laws under which said taxes were assessed still continued in force. See Session Laws of 1839. pp. 168 and 177.

An act to regulate tax-sales for 1843 authorizes the sale of all lands for delinquent taxes assessed in the years 1836, 1837, and 1838. The several county treasurers are to make the sales under the direction of the auditor-general. See Session Laws of Michigan of 1843, pp. 55 and 70.

It is clear, then, that "the lands in question," belonging to the complainant, were authorized by the statutes of Michigan to be assessed for taxation, and to be sold for the non-payment of taxes.

It is equally clear, from the plain language of the statutes, and from the practical interpretation put upon them by all the public authorities of Michigan, that "they were intended to direct the assessment for taxation of lands" purchased from "the United States, before the patents for them had been executed by the officers of the United States," but after the money had been paid for them, and certificates of purchase and payment had been received from the proper land-officer.

2. To the question, "whether the lands in question were, before the date and execution of the patents for them, subject to taxation at all by the state of Michigan," I answer in the affirmative.

In the case *John H. Ostrom et al.* v. *Charles G. Hammond*, auditor-general of the state, tried in the Circuit Court of the United States for the district of Michigan, at the June term of 1842, before Judge Wilkins, it was decided that the entry of public lands, the payment of the purchase money, and the certificate of the receiver, constituted such an equitable interest and title in the land as to authorize its taxation by the state, and its sale for the non-payment of the taxes.

At the succeeding October term of the same court, Judge McLean presiding, the decision of the court, at the preceding term, in the case of *Ostrom* v. *The Auditor-General*, was confirmed, both judges concurring in opinion.

Newspaper reports of the case have alone, as yet, been published. But the decision must remain fresh in the memory of Mr. Justice McLean of this court.

In the case of *Douglas* v. *Dangerfield*, in the Supreme Court of Ohio, the court stated that the right to tax lands within the borders of that state, before they become the property of individuals, was a right which had been exercised from the earliest period of the state government, with respect to all lands except those belonging to the United States, while so *457] held, or for a limited period after the same *were sold. This limited period has reference to the five years' exemption, which the compact of admission between the United States and Ohio secures to purchasers of public lands in that

state, after they have made their purchases. No such exemption is stipulated in the compact which admitted Michigan into the union. She has the right to tax as soon as the public lands are purchased.

Judge Hitchcock adds, in this same case, that "if the right to tax exists, and that it does there has not been any serious question for many years at least, it would seem to follow, that the right to collect must also exist, although in making collection it might become necessary to transfer to a new proprietor the thing taxed." When, however, this question "does arise, it must be purely a legal question, to be settled by a court of law." 10 Wilcox (Ohio), 156. See also, pp. 154, 155.

In Ohio, it is well known that lands entered and surveyed in the military land district, have for years been taxed, and sold for taxes, before they were patented. This is stated in the report of the case of *Hennick et al.* v. *Wallace*, 8 Ohio, 540, where the court say, that in another case, which was cited, "it was expressly held, that where lands have been entered and surveyed in the military land district, and sold for taxes before patented, that when patented, the patentee must hold the land subject to any claim which a purchaser at tax-sale may have in consequence of such sale." In the case of Hennick, just referred to, the land was sold for taxes before patented, and the court said that the sale was legal, so far as anything appeared to it in the case. 8 Ohio, 541.

In the case of the lessee of *Stuart and others* v. *Parish*, Supreme Court of Ohio, at the December term, 1833, 6 Hamm. (Ohio), part 1, 476, 477, Stuart purchased the tract No. 5, in the Sandusky Reserve, in 1817, and made the first payment. He afterwards took the benefit of the eight years' credit, under the laws which then prevailed. Stuart did not complete the payment for the land until 1830. Four years before that, the land was taxed. The court would not entertain the question, whether the land was liable to taxation before patent issued, but admitting the legality of the sale for taxes, said, that the legal title of the patentee was not affected by such sale. In other words, the tax-title could not convey an interest to the purchaser superior to that of the owner at the time of the sale for taxes.

In Alabama, before public lands finally pass into the hands of the purchaser by patent, the collector may rent at auction so much as will pay the tax, but cannot sell until the title is complete.

The Supreme Court of the United States, in the case of *Bagnell et al.* v. *Broderick*, 13 Pet., 436, decided, that "no

doubt is entertained of the power of the states to pass laws to authorize purchasers to prosecute actions of ejectment, or certificates of purchase, against trespassers on the lands purchased." If conflicting patents issue, the state courts may give effect to the better right.

*458] *In Pennsylvania, where the consideration for the land has been paid, a survey, though unaccompanied by a patent, gives a legal right of entry. 3 Dall., 457.

The authorities, then, clearly show that lands are subject to taxation by the state, on certificates of purchase, before the patent issues. It would be very extraordinary if an individual could purchase lands of the United States, settle, improve, and cultivate them, on certificates of purchase, and yet, because, from the neglect and delay of the proper department, the patents are not issued for several years, they are exempt from taxation, while his neighbor was compelled to pay taxes, when he was deriving no greater advantage from the possession and cultivation of his land.

Lands purchased and paid for at the land-offices, are not thereafter the property of the United States. The United States cannot withhold the patents, except in a few specified cases, as where the sale was illegal; where a prior sale or reservation, or a prior grant, may have been made; where the land had not previously been offered at public sale, or where it had been directed by government to be withheld from sale. These are rare exceptions, and do not affect or impair the general principle, that, as soon as the public land is purchased and paid for, it becomes the property of the purchaser, and may be sold and transferred by him, as is constantly the case, before it is patented. If the authorities and decisions were not in favor of the right of the state to tax such land or certificates of purchase, reason and common sense would demonstrate its equity and justice.

3. It follows from these views, which show that lands are subject to taxation before they are patented, that it is competent for the state to assess, tax, and sell them, as the property of the owner, as if they had been patented.

If, from accident, or the exceptions adverted to under the preceding head, the certificates of purchase should not be matured into patents, the purchaser at a tax-sale could not acquire a better title than the holder of the certificate. That is his risk. But in the case of the present complainant, it is not pretended that his titles were not perfected. On the contrary, the record brought up here alleges and admits that the patents for his lands were issued on the 12th of August, 1837. And this was before the lands were sold for the taxes.

4. It is doubted whether the remedy sought in this case, by a bill in equity, is proper. In the case of *Ostrom* v. *The Auditor-General*, involving the same principles as the case of the complainant involves, Judge Wilkins said that the complainants had an adequate and complete remedy in the state courts for any injury they might sustain by the sale of their lands for taxes, if the taxation and sale were illegal. And the 16th section of the act of 1789, establishing the courts of the United States, provides that suits in equity shall not be sustained in the courts of the United States, in any case where a plain, adequate, and complete remedy may be had at law.

*Mr. Justice McLEAN delivered the opinion of the court. [*459

The complainant filed his bill in the Circuit Court of the United States, in Michigan, stating that he is the owner in fee-simple of certain lands lying in Genesee county, amounting to three thousand five hundred and forty-nine and seventy-one hundredths acres, and of the value of $7,500. That, in 1836, he entered these lands, paid for them, and received from the land-office a final certificate. Patents were issued for them on the 12th of August, 1837. That the delay in issuing the patents was not at the instance of complainant. Before the emanation of the patents, the lands were assessed for taxation, and sold by the defendant for the taxes thus assessed. Two years are allowed the owner to redeem the land by the act of Michigan, on the payment of the tax, charges, and interest, at the rate of twenty per cent. per annum. When this bill was filed, the time of redemption had not expired. The bill prays, that the assessment and sale may be declared illegal and void, and that the defendant may be enjoined from conveying the land, and other relief, &c.

The case was considered as on a demurrer to the bill, and on the argument, the opinion of the judges were opposed on the following points:—

1. "Whether the statutes of the state of Michigan did, in fact, authorize the assessment and sale of the lands in question, and whether said statutes were intended to direct the assessment for taxation of lands of the United States, before the patents for them had been executed by the officers of the United States."

2. "Whether the lands in question were, before the date and execution of the patents for them, subject to taxation at all by the state of Michigan."

3. "Whether if they were subject to taxation by the state,

before the execution of the patents for them, it was competent to assess, and tax, and sell them, as the absolute property of the complainant, and at their full value, as if he owned them in fee."

4. "Whether the remedy by bill in equity, and the relief sought, are proper."

The 1st section of the act of the 22d of April, 1833, of the territory of Michigan, provides, "that the taxes hereafter to be levied in this territory shall be assessed, levied, and paid in the manner hereinafter mentioned, upon a valuation of real and personal estate," &c.

By the 2d section the assessors of the different districts, "according to the best evidence in their power," are required to make out "a list or schedule of all the taxable property in the same," and bring the said lists or schedules together, and jointly value the property named in each, and set down in their assessment-roll the value of buildings in such township, owned or possessed by any person residing in such township," &c. "And the assessors shall ascertain *what lands *460] are situated in their townships, not owned by persons residing in such townships, and shall, in their assessment-rolls, separate from the assessments made the estates of non-residents, and designate such land in the following manner: if the estate be a patent or tract of land of the subdivision of which the assessors cannot obtain correct information, they shall enter the name of the patent or tract, if known by any particular name, without regarding who may be the owner thereof; and if such tract be not known or designated by any particular name, they shall state by what other land the same is bounded, and shall set down the quantity of land contained therein in the proper columns for that purpose."

By the 14th section, the tax, interest, and charges thereon, constitute a lien on the land, though aliened, and unless paid within two years from the 1st of May succeeding the assessment of such tax, the treasurer of the proper county, after giving notice, is required to sell the same. And if the person claiming title to said lands shall not pay to the treasurer, for the use of the purchaser, his heirs or assigns, the sum paid by him for the lands, with interest at the rate of twenty per cent. per annum, the treasurer shall execute to the purchaser, his heirs or assigns, "a conveyance of the lands so sold, which conveyance shall vest in the person or persons to whom it shall be given an absolute estate in fee-simple," &c.; "and such deed may be given in evidence, and recorded in the same manner and with like effect as a deed regularly acknowledged by the grantor may be given in evidence and recorded."

It is first contended, "that the statutes of Michigan did not embrace the land in question, and were not intended to authorize their assessment."

In answer to this, it may be said, that a different construction has been put upon the above statutes by the authorities of the territory, and also of the state since its admission into the union. The practical construction of local laws is, perhaps, the best evidence of the intention of the law-makers. The courts of the United States adopt as a rule of decision the established construction of local laws. And it cannot be material, whether such construction has been established by long usage or a judicial decision.

But independently of the force of usage, we think the construction is sustainable. When the land was purchased and paid for, it was no longer the property of the United States, but of the purchaser. He held for it a final certificate, which could no more be cancelled by the United States than a patent. It is true, if the land had been previously sold by the United States, or reserved from sale, the certificate or patent might be recalled by the United States, as having been issued through mistake. In this respect there is no difference between the certificate-holder and the patentee.

It is said, the fee is not in the purchaser, but in the United States, until the patent shall be issued. This is so, technically, at law, but *not in equity. The land in [*461 the hands of the purchaser is real estate, descends to his heirs, and does not go to his executors or administrators. In every legal and equitable aspect it is considered as belonging to the realty. Now, why cannot such property be taxed by its proper denomination as real estate? In the words of the statute, "as lands owned by non-residents." And if the name of the owner could not be ascertained, the tract was required to be described by its boundaries or any particular name. We can entertain no doubt that the construction given to this act by the authorities of Michigan, in regard to the taxation of land sold by the United States, whether patented or not, carried out the intention of the law-making power.

But it is insisted, "that the lands in question were not, before the date and execution of the patents for them, subject to taxation at all by the state of Michigan."

It is supposed that taxation of such lands is "an interference with the primary disposition of the soil by Congress," in violation of the ordinance of 1787; and that it is "a tax on the lands of the United States," which is inhibited by the ordinance. Now, lands which have been sold by the United

States can in no sense be called the property of the United States. They are no more the property of the United States than lands patented. So far as the rights of the purchaser are considered, they are protected under the patent-certificate as fully as under the patent. Suppose the officers of the government had sold a tract of land, received the purchase money, and issued a patent-certificate, can it be contended that they could sell it again, and convey a good title? They could no more do this than they could sell land a second time which had been previously patented. When sold, the government, until the patent shall issue, holds the mere legal title for the land in trust for the purchaser; and any second purchaser would take the land charged with the trust.

But it is supposed that because on some certificates patents may not be issued, taxation of unpatented land is an interference "with the primary disposition of the land." And it is said that in the case of *Ostrom* v. *The Auditor-General of Michigan*, before the Circuit Court in 1842, out of one hundred certificates patents were refused on fourteen of them; that those lands had been sold for taxes and conveyed under the statutes of Michigan; and that the United States either retain those lands or have conveyed them to third parties.

Michigan does not warrant the title to lands sold for taxes. The deed, by the express words of the statute, when duly executed and recorded, "may be given in evidence in the same manner, and with like effect, as a deed regularly acknowledged by the grantor," &c. The government has no right to refuse a patent to a *bona fide* purchaser of land offered for sale. But *462] where there has been fraud, or mistake, the patent may be withheld, and every purchaser at a tax-sale *incurs the risk as to the validity of the title he purchases. He incurs the same risk after the emanation of the patent. But how this interferes with "the primary disposition of the public lands," by the United States, is not perceived. The sale for taxes is made on the presumption that the purchase from the government has been *bona fide*, and if not so made, the purchaser at the tax-sale acquires no title, and consequently no embarrassment can arise in the future disposition of the same land by the government.

It is known to be universally the practice in the west, where lands are purchased for a residence and cultivation, that the purchaser enters immediately into the possession of them. And it may also be observed, that in all the new states, lands purchased of the United States have uniformly been held liable to be taxed before they are patented. And, indeed, in Ohio, under the credit system, lands were taxed

after the expiration of five years from the time of their purchase, although they had not been paid for in full. There was no compact made with Michigan, as with Ohio, not to tax lands sold by the United States until after the expiration of five years from the time of sale. The court think that the lands in question were liable to taxation under the authorities of Michigan.

It is contended "that such lands should not be taxed at their full value, nor should they be sold as if the claimant owned them in fee."

The statute does provide that the conveyance, under a tax-sale, "shall vest in the purchaser an absolute estate in fee-simple," &c. Two years and more are required to elapse after the tax shall become due, before the land is liable to be sold; and the deed is not to be executed before the lapse of two years after the sale, during which time the owner has a right to redeem. This is a tardy proceeding, and gives ample time to non-residents for the payment of their taxes, &c. The land should be estimated at its full value, as the owner, having paid for it, is subjected to no additional charge for the obtainment of the patent. And although the statute may purport to give a higher interest in the land than the owner could convey, yet it does not follow that such title is inoperative. It must at least convey the interest which the owner has in the lands. Or it may be that a higher interest is conveyed. But whether such a conveyance shall take effect as in fee, under the statute, when executed, or when the patent shall be issued, or at any time, it cannot be necessary now to inquire. The only inquiry is, whether the land should not be estimated at its full value, and sold by the state for the tax regularly assessed upon it. The effect of the title is not now before us for consideration. The conveyance of real estate, whether by deed or by operation of law, is subject to the law of the state; and it is difficult to say that any restraint can be imposed upon the local power on this subject. It cannot, however, convey a better title to the land sold for taxes than the owner of such land, *to whom it stands charged, possessed at the time the taxes constituted a lien, or when the land was sold. Whether the legislature may not change the character of a title, so as to make that a legal title which before was only an equity, is a very different question. [*463

In the case of the *Lessee of Wallace* v. *Semour and Renich*, 7 Ohio, 156, the court held "that a purchaser at a sale for taxes can acquire a right which can be enforced in equity, although he has been defeated at law." But that case grew out of the peculiar phraseology of the statute. It was also

decided that "where lands have been entered and surveyed in the military district, and sold for taxes before patented, that when patented, the patentee should hold the land subject to any claim which a purchaser at tax-sale may have in consequence of such sale." And in *Lessee of Stuart* v. *O. Parish*, 6 Ohio, 477, that a purchaser of land at a tax-sale, before a patent was issued, could not set up, in an action of ejectment, the tax-deed against the patentee. In *Douglass* v. *Dangerfield*, 10 Ohio, 156, the court say, in reference to taxing lands before the patent has been issued, "if the right to tax exists, and that it does there has not been any serious question for many years at least, it would seem to follow that the right to collect must also exist."

Under the Michigan statutes, we have no doubt, the law-making power intended to tax lands that had been entered and paid for, as the lands in question, and that it had the power to impose the tax. The nature of the title of such lands, under a tax-sale, not being involved in the points certified, we will not further discuss.

In regard to the fourth point certified, we entertain no doubt, that, in a proper case, relief may be given in a court of equity. This may be done on the ground to prevent a cloud from being cast on the complainant's title, or to remove such cloud; to prevent multiplicity of suits, or to prevent an injurious act by a public officer, for which the law might give no adequate redress. We answer all the questions certified in the affirmative.

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*464] *JOHN LANE AND SARAH C. LANE, WIFE OF THE SAID JOHN, AND ELIZABETH IRION, AN INFANT UNDER TWENTY-ONE YEARS, WHO SUES BY JOHN LANE, HER NEXT FRIEND, COMPLAINANTS AND APPELLANTS, *v.* JOHN W. VICK, SARGEANT S. PRENTISS ET AL., DEFENDANTS.

Newit Vick made the following devises, viz.:

2dly. I will and bequeath unto my beloved wife, Elizabeth Vick, one equal share of all my personal estate, as is to be divided between her and all of my children, as her own right, and at her own disposal during her natural life; and also, for the term of her life on earth, the tract of land at the Open Woods on which I now reside, or the tracts near the river, as she may choose, reserving two hundred acres however, on the upper part of the uppermost tract, to be laid off in town lots at the discretion of my executrix and executors.

3dly. I will and dispose to each of my daughters, one equal proportion with my sons and wife, of all my personal estate as they come of age or marry;

and to my sons, one equal part of said personal estate as they come of age, together with all of my lands, all of which lands I wish to be appraised, valued, and divided when my son Westley arrives at the age of twenty-one years, the said Westley having one part, and my son William having the other part of the tracts unclaimed by my wife, Elizabeth; and I bequeath to my son Newit, at the death of my said wife, that tract which she may prefer to occupy. I wish it to be distinctly understood, that that part of my estate which my son Hartwell has received shall be valued, considered as his, and as a part of his portion of my estate.

I wish my executors, furthermore, to remember, that the town lots now laid off, and hereafter to be laid off, on the aforementioned two hundred acres of land, should be sold to pay my just debts, or other engagements, in preference to any other of my property, for the use and benefit of all my heirs.

From the provisions of the will it appears not to have been the intention of the testator to include the town lots in the devise of his lands to his sons. But these town lots must be sold, after the payment of debts, for the use and benefit of all the heirs of the testator.

The mere construction of a will by a State Court, does not, as the construction of a statute of the state, constitute a rule of decision for the courts of the United States. If such construction by a State Court had been long acquiesced in, so as to become a rule of property, this court would follow it.[1]

THIS was an appeal from the Circuit Court of the United States for the southern district of Mississippi, sitting as a court of equity.

The case was this.

In 1819, Newit Vick, a citizen of the state of Mississippi, died, leaving a wife and the following children:

Sons.—Hartwell Vick, John Westley Vick, William Vick, Newit H. Vick.

Daughters.—Nancy, Sarah, Mary, Eliza, Lucy, Matilda, Amanda, Martha, Emily.

The wife, however, died in a few minutes after her husband.

In October, 1819, the will of the deceased was admitted to probate in the Orphan's Court of Warren county, and was as follows:

[1] CITED. *Railroad Co.* v. *National Bank*, 12 Otto, 53; *Talcott* v. *Township of Pine Grove*, 1 Flipp. 124; *Sanford* v. *Town of Portsmouth*, 2 Id., 108. See *Scott* v. *Jones*, 5 How., 378.

In *Derby* v. *Jacques*, 1 Cliff., 425, 438, it is said: "Repeated decisions of the Supreme Court have established the doctrine that the Federal courts adopt the local law of real property as ascertained by the decisions of the state courts, whether those decisions are grounded on the construction of the statutes of the state, or form a part of the unwritten law of the state, which has become a fixed rule of property." See *Jackson* v. *Chew*, 12 Wheat., 153; *Daly* v. *James*, 8 Id., 495; *Henderson* v. *Griffin*, 5 Pet., 151. The decision of a state court followed in the construction of a devise. *Abbott* v. *The Essex Company*, 2 Curt., 126, (1854.) So as to statutes. *Thompson* v. *Phillips*, Baldw., 246, 284; *Boyle* v. *Arledge*, Hempst., 620; *Bell* v. *Morrison*, 1 Pet., 351, 359; *Brown* v. *Van Bramn*, 3 Dall., 344; *McKeen* v. *Delancy*, 5 Cranch, 22; *Polk* v. *Wendall*, 9 Id., 87; *Martin* v. *Hunter*, 1 Wheat., 304, 379; *Shipp* v. *Miller*, 2 Id., 316; *Thatcher* v. *Powell*, 6 Id., 119; *Dewolf* v. *Johnson*, 10 Id., 140, 152; *Doe* v. *Winn*, 11 Id., 355. In *Bank of Hamilton* v. *Dudley*, 2 Pet., 492, 520, the decision was withheld until the Ohio Supreme Court had passed upon the statute in question.

"In the name of God, Amen! I, Newit Vick, of Warren county, and state of Mississippi, being of perfect mind and memory, and *calling to mind the mortality of life, and *465] knowing that it was appointed for all men once to die, do make and ordain this my last will and testament, in the manner and form following, to wit:

"Primarily, and first of all, I give and dispose my soul into the hands of Almighty God, who gave it, and my body I recommend to be buried in a Christian-like and decent manner, according to the discretion of my executors.

"2dly. I will and bequeath unto my beloved wife, Elizabeth Vick, one equal share of all my personal estate, as is to be divided between her and all of my children, as her own right, and at her own disposal during her natural life; and also, for the term of her life on earth, the tract of land at the Open Woods on which I now reside, or the tracts near the river, as she may choose, reserving two hundred acres, however, on the upper part of the uppermost tract, to be laid off in town lots at the discretion of my executrix and executors.

"3dly. I will and dispose to each of my daughters, one equal proportion with my sons and wife, of all my personal estate as they come of age or marry; and to my sons, one equal part of said personal estate as they come of age, together with all of my lands, all of which lands I wish to be appraised, valued, and divided when my son Westley arrives at the age of twenty-one years, the said Westley having one part, and my son William having the other part of the tracts unclaimed by my wife, Elizabeth; and I bequeath to my son Newit, at the death of my said wife, that tract which she may prefer to occupy. I wish it to be distinctly understood, that that part of my estate which my son Hartwell has received shall be valued, considered as his, and as a part of his portion of my estate.

"4thly and lastly. I hereby nominate and appoint my beloved wife Elizabeth, my son Hartwell, and my nephew Willis B. Vick, my sole and only executrix and executors of this my last will and testament. It is, however, furthermore my wish that the aforesaid Elizabeth should keep together the whole of my property, both real and personal, reserving the provisions before made, for the raising, educating, and benefit of the before-mentioned children.

"It must be remembered, that the lot of two acres on the bank of the river on which a saw-mill house is erected, belongs to myself, son Hartwell, and James H. Center, when the said Center pays his proportional part.

"I wish my executors, furthermore, to remember, that the

town lots now laid off, and hereafter to be laid off, on the aforementioned two hundred acres of land, should be sold to pay my just debts, or other engagements, in preference to any other of my property, for the use and benefit of all my heirs, and that James H. Center have a title made to him for one lot already laid off of half an acre in said two hundred acres, and on which he has builded, when he pays to my executors the sum of three hundred dollars.

*"In testimony whereof, I have hereunto set my hand and seal, this 22d day of August, in the year of our Lord 1819. [*466

"The words interlined, 'for the use and benefit of all my heirs,' before signed. NEWIT VICK. [SEAL.]

FOSTER COOK,
EDWIN COOK,
B. VICK."

The wife being dead, Hartwell, one of the executors, virtually renounced the executorship, and Willis, the other executor, gave the necessary bond and took out letters testamentary; but being in bad health, he was, with his own consent, removed. John Lane, one of the complainants, who had married Sarah, one of the daughters of the testator, then took out letters of administration with the will annexed, and filed accounts, from time to time, until the year 1829, when he filed his final account and was discharged. He reported the sale of sixty-seven town lots at various prices and to various persons. The debts of the testator were all paid.

In 1831, John Westley Vick sold a portion of his interest, which was subdivided by sundry mesne conveyances, and came into the possession of several holders.

In 1838, the plaintiffs, being residents of Louisiana and Tennessee, filed their bill against all the other descendants of the testator, and claimants under them. It recited the facts above set forth, and proceeded thus:—

"Your orators would further allege, that some years since the said Willis B. Vick departed this life, and that for some years all the executors of the last will and testament of said Newit Vick have been dead. Your orators allege, that only a few lots had been laid off and sold by Newit Vick, in his lifetime, and that your orator, John Lane, as administrator, with the will annexed, laid off by actual survey the said town of Vicksburg, off of the upper end of the uppermost tract, referred to in said will; which will, as your honors will perceive, directed the same to be done. Lots and parts of lots have been sold from time to time by the said administrator, and the amounts of the sales applied to the payment and

liquidation of the debts of the said Newit Vick, until all the debts which he, the said Newit Vick, owed, so far as are known, have been paid off and discharged.

"They would further state, that there yet remain lots and parts of lots, and parcels of ground in said town, and on said two hundred acres, which are unsold, and more especially, that part of said town known by the name of 'Commons,' and 'Levee street,' which have descended to the heirs of said Newit Vick, hereinafter mentioned. They would further represent, that the powers of said Lane, administrator, to sell the unsold lots, parcels of ground, as above stated aforesaid, have been doubted and brought into question, which renders it to *467] him a matter of prudence and sound discretion to *stop the sales, since the debts of Newit Vick have been paid, and ask the advice of this honorable court, sitting in chancery, who have the burden, and whose duty it is to explain the nature of all trusts, and decree the performance of the same, to say what shall be done with the residue of the unsold lots, and parts of lots, commons, Levee street, &c., in said town, and on said two hundred acres."

It concluded thus:—

"Your orators pray your honors, upon a final hearing of this cause, to decree a division and partition of the aforesaid lots, parts of lots, commons, and Levee street, to be made between them and the other heirs of Newit Vick; and that said claimants shall be put into possession of the part allotted to her or them, and that the defendants shall account for the rents and profits which they have respectively received. Or if a partition and division of the ground aforesaid, as above asked for, is not, in the opinion of this honorable court, carrying the will of the testator, Newit Vick, into full and complete effect, according to the true intent and meaning thereof, then may your honors decree and order the said John Lane, administrator with the will annexed, to proceed to sell said grounds, upon such terms and credits as you may deem proper, and then distribute the money among the several claimants, according to their respective interests, and grant all such other relief as to justice may belong."

Some of the defendants answered the bill, admitting the truth of its statements, and concurring in the prayer for a division, "among the several claimants, according to the nature and extent of them as heirs, and also under the will of Newit Vick;" others concurred generally, and prayed that their parts might be allotted to them.

The parties made defendants, as vendees, &c., to wit, Prentiss, &c., demurred to the bill; and the cause being set down

for hearing on this state of preparation, the court, in June, 1842, sustained the demurrer, and dismissed the bill.

From this decree the complainants appealed.

Ben Hardin, (in print,) for the plaintiffs in error.
Crittenden, for the defendants in error.

This is one of the cases which was argued during an unavoidable absence of the Reporter; and although he is enabled to give Mr. *Hardin's* argument, he regrets that he cannot furnish that of Mr. *Crittenden*.

Hardin, after stating the case, proceeded thus:—

From the face of the will, and also the statements of the bill, it appears that the testator owned a tract of land in the Open Woods, a few miles from the Mississippi river, on which he resided at his *death; and also two tracts and parcels of land, included in one survey, on the Mississippi, [*468 immediately below and adjoining the Walnut Hills. The lands on the Mississippi had only been surveyed when the testator died, and patented after his death. The second clause in the will gives to the wife of the testator, "for the term of her life on earth, the tract of land at the Open Woods, on which he then resided, or the tracts near the river, as she may choose, reserving two hundred acres, however, on the upper part of the uppermost tract, to be laid off in town lots, at the discretion of my executrix and executors." The court will perceive that the two hundred acres, on which the town was to be laid off, are expressly reserved out of the devise to the wife of the testator. In the third clause of the will there is the following devise: "And to my sons, one equal part of my said personal estate, as they come of age, together with all my lands, all of which lands I wish to be appraised, valued, and divided, when my son Westley arrives at the age of twenty-one years; the said Westley having the one part, and my son William having the other part of my tracts unclaimed by my wife Elizabeth; and I bequeath to my son Newit, at the death of my said wife, the tract she may prefer to occupy." The question from this clause is, what lands were disposed of by it? I contend it is all his lands, except the two hundred acres directed to be laid off into town lots, because the objects the testator had in view in laying off the town into lots, and selling the same for the payment "of his debts and liabilities," are utterly inconsistent and incompatible with devising the same away to his sons.

And the expression, "all my lands," must be understood to mean, except the two hundred acres reserved for the town. Should it be contended that the expression, "all my lands," will embrace the two hundred acres to be laid off into town lots, leaving the executors power to sell so much of it as would pay the debts of the testator: the answer to that argument is, that the lands devised to his sons "are to be appraised, valued, and divided when Westley arrives at the age of twenty-one years." The time fixed on for a division of the land would, in all probability, arrive before the debts and liabilities of the testator would be paid off, or even known; for aught the court knows or can know, on the demurrer, Westley might have been, at the death of the testator, within one or two years of twenty-one, (which was the fact,) and thereby leave no time, or at least not sufficient time to ascertain his debts and pay them off, and settle all his liabilities, before "the lands were to be appraised, valued, and divided." When Westley might arrive at twenty-one years of age the persons appointed to appraise, value, and divide the lands would not know what portion of the lots would be required to be sold to pay the debts. The above reason excludes the idea that he intended to devise said lots, or any of them, to his sons. The whole amount of the debts of the testator, as settled by the court in August, 1829, was $38,-
*469] 704.16. *The laying off the town was a mere experiment of the testator to enable his executors to meet his debts and liabilities. It might succeed and pay his debts, and then again it might fall far short. These experiments of new towns to raise funds are as uncertain and precarious as lotteries. And hence it never entered into the design of the testator to will away the unsold lots, after the debts were paid, and to fix on a time certain, when the power of the executors to sell should cease, because it must cease "when appraised, valued, and divided." There is another argument growing out of the third clause of the will, which I deem conclusive in favor of the position I contend for. The testator had two tracts of land, one in the Open Woods, and one on the Mississippi. His wife had a right from the will to select which she chose for her residence; but the town part of the river tract was expressly reserved, and was not within the devise to her. Suppose she had selected the river tract, then Newit, the son of the testator, was to have that tract "which she may prefer to occupy;" and Westley and William the other tract, to wit: the Open Woods. If the wife of the testator had selected the river tract, then, at her death, what would Newit Vick take? Just what she selected to occupy,

no more or less. For if more was intended, that is the residue of the river tract, if she had selected it, why withhold that part from him until she died, when she by the will had no claim to it? It surely is not compatible with the fair exposition and interpretation of the will to say, that if Mrs. Vick selected the river tract, then Westley and William would be entitled to the Open Woods, and also the two hundred acres off of the upper end of the uppermost tract, which was laid off into town lots. Besides, Westley and William were to have the other part of the tracts unclaimed by his wife Elizabeth. The construction of the will contended for on the other side, just amounts to this, that Westley and William Vick took the two hundred acres which were to be laid off in lots, without the wife of the testator or his son Newit having any claim to that part. Then why use the words "unclaimed by my wife Elizabeth," if she had no claim from the will? The word "unclaimed" clearly proves that the testator gave no lands to Westley and William, except such lands as the wife of testator had the right to claim as her future residence, if she chose.

The last clause in the will has these words interlined and underscored, "for the use and benefit of all my heirs." These words have no meaning in them, if it be only intended that by the sale of his lots to take the burden of the payment of his debts off of his personal estate, and that in that way it would be for the benefit of all his heirs, as all are to have an equal share of that, because that would have been the effect and operation of that clause without the interlineation of the above words. The clear meaning is, the town lots are for the benefit of all my heirs. By adding the word "and" before the word "for," then it would read thus: *"and for the use and benefit of all my heirs." [*470
The word "and" added would free the will from all ambiguity and uncertainty, and then the interlineation, which was inserted with deliberation, will have some meaning, otherwise it has none; all words and parts of a will shall have some meaning, if by any sensible construction of the will the same can be done. It is certain that the interlineation was inserted after the will was wrote, and the necessity of it was suggested upon the last reading, before signing, which shows that the testator deemed the interlineation essential to carry out his meaning. The fact is, it is well remembered by all present, who are yet alive, that on the reading of his will, one of the daughters of the testator asked him if his daughters were to have an interest in the towns lots; upon the testator answering in the affirmative, she replied, to clear the will of all

doubt, the interlineation had better be made, which was accordingly done. I am aware that these facts are inadmissible, but at all events the interlineation goes to show that something of the kind did occur. There is yet another question; the wife of the testator died in about ten minutes after her husband, and was, from the death of the testator, until her death, incapable of making a selection of the place of her future residence, and never made any, or attempted to make any.

If the town lots passed by the will of the testator to his sons, then Newit Vick is entitled to one-third. His answer is a cross-bill, and should have been retained, and, upon a final hearing, one-third allotted to him. I will refer the court to the laws of Mississippi, to show that all the legitimate children inherit equal share and share alike, and also to Swinburn, 20, 21, 22, 638, 639. The meaning of the testator is all that is sought after by the judges. There is another principle of law universally admitted to be correct, that heirs are not to be disinherited by a doubtful construction.

Crittenden, for defendants in error, laid down the following propositions:

1. That (subject to an estate for life to his wife) "all" the lands of the testator are devised to his sons, in exclusion of his daughters.

2. That the last clause of the will does not affect the devise to the sons, otherwise than by creating a charge upon the town lots for the payment of debts, thereby exonerating and preserving the personal estate for the use and benefit of all the parties to whom it had been bequeathed. And those debts being paid, (as appears by confession of the complainants,) the encumbrance is discharged, and no ground of interest or complaint left to the complainants.

3. That if any right or title, other than above supposed, was devised to the complainants, it is expressly limited and confined to the "town lots now laid off, and hereafter to be laid off," &c. By the bill, it appears that the lots laid off by the testator were sold by him, and that no others were thereafter laid off by the executors, to whose *discretion it was confided; so that there are no lots to which any right or claim of the complainants can attach.

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4. That Lane's appointment as administrator was illegal and void; and, if not, that he had no right to exercise the power and discretion confided in the executors of laying off and selling town lots; and that his laying off lots can confer no right thereto upon the complainants.

5. That the construction of the will insisted on in the 1st and 2d of the above propositions, and the points stated in all the foregoing propositions, have been in substance so decided and settled by the Supreme Court of the state of Mississippi, and that decision will be regarded as conclusive in this court, according to its well established principles.

On the 1st proposition, he cited 10 Wheat., 159; 8 Id., 535; 12 Id., 162, 168, 169; 5 Pet., 155; 16 Ves., 446; 3 Mass., 381; 3 Bibb. (Ky.), 349; 4 Johns. (N. Y.) Ch., 365: and in support of the 5th proposition, 1 How. (Miss.), 379, 442; *United States* v. *Crosby*, 7 Cranch, 115; 9 Wheat., 565; 10 Id., 202.

Mr. Justice McLEAN delivered the opinion of the court.

This case is brought here by an appeal from the decree of the Circuit Court for the district of Mississippi.

The complainants under the will of Newit Vick, late of the state of Mississippi, deceased, claim certain interests in a tract of two hundred acres of land, on which the town of Vicksburg is laid off. In the bill various proceedings are stated as to the proof of the will, the qualification of one of the executors named in it, the death of the executrix, and the refusal of one of the executors named to qualify; that the executor who qualified was afterwards removed, with his consent, and Lane, the complainant, appointed administrator, with the will annexed; that acting under the will, the administrator laid off the town of Vicksburg, sold lots, and paid the debts of the deceased; that there yet remains certain parts of the above tract undisposed of; and that his power as administrator to sell the unsold lots is questioned.

The defendants are represented as being interested in the above tract, as devisees and as purchasers; and the complainants pray that the court would decree a partition of the lots, commons, and Levee street, to be made between them and the other devisees of Newit Vick; and that said claimants shall be put in possession, &c.; or that said property may be sold, &c., as shall best comport with the intent of the testator.

The defendants favorable to the object of the bill answered; the others demurred to the bill, which was sustained on the hearing, and the bill was dismissed, from which decree this appeal was taken.

The decision of this case depends upon the construction of the will of Newit Vick. It was proved the 25th of October, 1819.

*Every instrument of writing should be so construed as to effectuate, if practicable, the intention of the parties to it. This principle applies with peculiar force to a will [*472

Such an instrument is generally drawn in the last days of the testator, and very often under circumstances unfavorable to a calm consideration of the subject-matter of it. The writer, too, is frequently unskilful in the use of language, and is more or less embarrassed by the importance and solemnity of the occasion. To expect much system or precision of language in a writing formed under such emergencies, would seem to be unreasonable. And it is chiefly owing to these causes that so many controversies arise under wills.

In giving a construction to a will, all the parts of it should be examined and compared; and the intention of the testator must be ascertained, not from a part, but the whole of the instrument.

By the second paragraph of the will under consideration, the testator bequeaths to his wife one equal share of his personal property, to be divided between her and her children. This would give to his wife one-half of his personal estate. But the succeeding paragraph qualifies this bequest so as to give to his wife a share of the personal property equal only to the amount received by each of his children. This shows a want of precision in the language of the will, and that one part of it may be explained and qualified by another.

In the second paragraph, the testator devises to his wife, during her natural life, "the tract of land at the Open Woods, on which he then resided, or the tracts near the river, as she might choose, reserving two hundred acres on the upper part of the uppermost tract to be laid off in town lots, at the discretion of his executrix and executors."

This discretion of his executrix and executors, referred to the plan of the town, and not to the propriety of laying it off. The testator had determined that a town should be established, and reserved for this purpose the above tract of two hundred acres, "to be laid off in town lots."

The testator next disposes of his personal property to his wife and children; and he says, "to my sons one equal part of said personal estate as they come of age, together with all my lands, all of which lands I wish to be appraised, valued, and divided, when my son Westley arrives at the age of twenty-one years; the said Westley having one part, and my son William having the other part, of the tracts unclaimed by my wife Elizabeth; and I bequeath to my son Newit, at the death of my said wife, that tract which she may prefer to occupy. I wish it to be distinctly understood, that that part of my estate which my son Hartwell has received, shall be valued, considered as his, and as a part of his portion of my estate."

By these devises, Newit, on the death of his mother, was to

have the tract selected by her for her residence. She died, it is admitted, *in a few minutes after the decease of the testator, so that no selection of a residence was made by her. But this is not important as regards the intention of the testator. What lands did he devise to his sons Westley and William? The answer is, the land unclaimed by the wife of the testator. His words are, "Westley having one part, and my son William having the other part, of the tracts unclaimed by my wife Elizabeth." But what tracts may be said to come under the designation of "tracts unclaimed by my wife?" The land which, under the election given to her in the will, she might have claimed as a residence, but did not. [*478

This claim by the widow was expected to be made shortly after the decease of the testator, as by it her future residence was to be established. If she selected the river land, then the Open Woods tract was to go, under the will, to Westley and William; but if the Open Woods tract were selected by the widow, then they were to have the river land. This devise being of the land unclaimed by the widow, presupposes her right to have claimed it in the alternative under the will. It did not include the town tract, for that was expressly reserved by the testator from the choice of his wife. That this is the proper limitation of the devise to Westley and William, seems to be clear of doubt.

To Hartwell was devised the tract on which he lived, and which was to be valued.

These are the specific devises of his lands, by the testator, to his four sons. The tract of two hundred acres reserved for the town is not affected by them. Did this tract pass to his sons under the general devise of his lands to them, in the third paragraph of the will? That point will be now examined. The words of the testator are, "and to my sons one equal part of said personal estate as they come of age, together with all of my lands, all of which lands I wish to be appraised, valued, and divided, when my son Westley arrives at the age of twenty-one years." The words "all of my lands," unless restricted by words with which they stand connected, or by some other part of the will, cover the entire real estate of the testator. But these words are restricted by the part of the sentence which follows them, and also in other parts of the will.

"All of which lands I wish to be appraised, valued, and divided, when my son Westley arrives at the age of twenty-one years," follow the words "all of my lands," and show that the tract of two hundred acres was not intended to be included in this general devise. Such an intention was incompatible

with the reservation of this tract for a town. In the second clause of the will are the words, "reserving two hundred acres, however, on the upper part of the uppermost tract, to be laid off in town lots." Now the testator could not have intended, in the next clause, to direct that this tract should be valued and divided among his sons. This would be repugnant *474] to the authority given to his executors to lay off a *town, and would have been an abandonment of what appears, from the last clause in the will to have been, with him, a favorite object. Did he intend the tract of two hundred acres should be valued and divided among his sons, which he directed in another part of his will to be laid off into town lots and sold by his executors? So great an inconsistency is not to be inferred. The general devise to his sons "of all his lands," was limited to the lands which he directed to be valued and divided among his sons. This cannot be controverted, for it is in the very words of the will, and does not depend upon inference or construction. The special devises to each of his sons, which follow the general devise, also, in effect, limit it. These devises cover all the real property of the testator, except the town tract, and show what he meant "by all his lands." He intended all his lands which he subsequently and specially devised, and not the tract which, in the will, he had previously reserved and afterwards disposed of.

In the next clause of the will the testator expresses his wish, that the aforesaid Elizabeth should keep together the whole of his property, both real and personal, (reserving the provisions before made,) for the raising, educating, and benefit of the before-mentioned children.

These exceptions refer to the share of the personal property which each child was to receive when married, or at full age, and to the land appropriated for the town.

We have now arrived at the last clause of the will, under which clause this controversy has arisen. The testator has made provision for his wife, by giving her a life-estate in one of two tracts of land as she might select, and an equal share, with each child, of the personal property. To his sons, in addition to his share in the personalty, he has given to each a portion of his real estate. He has made no disposition of the tract reserved for a town, but proceeds to do so in the following and closing paragraph of the will.

"I wish my executors furthermore to remember that the town lots now laid off, and hereafter to be laid off, on the aforementioned two hundred acres of land, should be sold to pay my just debts, or other engagements, in preference to any other of my property for the use and benefit of all my heirs."

This clause is construed, by the appellees, to be a charge on the two hundred acres of land for the payment of the debts of the testator only. And that the authority to the executors to sell lots, is limited to this object. That as the personal property bequeathed to his heirs was first liable for the debts of the deceased, the charge on this tract may well be said, in the language of the will, to be "for the use and benefit of all his heirs."

That there is plausibility in this construction is admitted. It may, at first, generally, strike the mind of the reader as reasonable and just. But a closer investigation of the structure of the paragraph, *and a comparison of it with other parts of the will, with the view to ascertain the [*475 intention of the testator, must, we think, lead to a different conclusion.

If the object of the testator had been, as contended, merely to charge this tract with the payment of his debts, would the words, "for the use and benefit of all my heirs," have been inserted? The sentence was complete without them. They add nothing to its clearness or force. On the contrary, if the intention of the testator was to pay his debts only, by the sale of lots to be laid off, the words are surplusage. They stand in the sentence, disconnected with other parts of it, and consequently, are without an object.

The testator directed that the town lots should be sold to pay his just debts, "in preference to any other of his property." This released his personal property, which he had bequeathed to his children, from all liability on account of his debts. And on the hypothesis that he only intended to do this, why should the above words have been added? They were not carelessly thrown into the sentence when it was first written. From the will, it appears they were interlined. This shows deliberation, and the exercise of judgment. Without this interlineation, the lots were required to be sold to pay debts, in preference to other property, in language too clear to be misunderstood by any one. It could not have been misunderstood, either by the testator or the writer of the will. But, as the paragraph was first written, it did not carry out the intention of the testator. To effectuate that intent, the interlineation was made. The words, "for the use and benefit of all my heirs," were interlined. Does this mean nothing? This deliberation and judgment? Were these words added to a sentence perfectly clear, and which charged the land with the payment of the debts of the testator, without any object? Were they intended to be words of mere surplusage and without effect? Such an inference is most unreasonable. It does

violence to the words themselves, and to the circumstances under which they were introduced. No court can disregard these words, or the manner of their introduction.

The testator was not satisfied with the direction to his executors to sell lots for the payment of his debts, but he adds, "for the use and benefit of all my heirs." By this he intended, that the lots should be sold for the payment of his debts, *and* "for the use and benefit of all his heirs." The omission of the word *and* has given rise to this controversy. Had that word been inserted with the others, no doubt could have existed on the subject. And its omission is reasonably accounted for, by the fact of the interlineation. On such occasions, more attention is often paid to the matter to be introduced, than to the word which connects it with the sentence. That the lots should be sold "for the use and benefit of all his heirs," after the payment of his debts, is most reasonable; but it cannot, with the same propriety of
*476] language, be said, that the debts *of the testator were to be paid "for the use of all his heirs." The word use imports a more direct benefit. That the phrase was used in this sense we cannot doubt.

The clauses in the will preceding the one which is now under consideration have been examined, and no disposition is found in any of them of the town tract. And if it be not disposed of in this last paragraph, after the payment of the debts, the remaining lots or their proceeds will descend generally to the heirs of the testator as personal property. The law will not disinherit the heir, on a doubtful devise. But we think the testator intended that the tract of two hundred acres should be laid out in lots and sold, "for the use and benefit of all his heirs," and "the payment of his debts and other engagements."

This construction of the will is strengthened by its justice to all the parties interested. That the testator intended to give to his sons a much larger part of his property than to his daughters, is evident. He gave to his sons an equal share, with his daughters, of his personal property. But did he intend to cut off his daughters from all interest in his real estate? He could not have had the heart of a dying father to have done so. He did not act unjustly to his daughters. They, equally with his sons, were devisees of the proceeds of the town lots, after the payment of all just debts and other engagements.

It is insisted that the construction of this will has been conclusively settled by the Supreme Court of Mississippi, in the

case of *Vick et al.* v. *The Mayor and Aldermen of Vicksburg*, 1 How. (Miss.), 379.

The parties in that case were not the same as those now before this court; and that decision does not affect the interests of the complainants here. The question before the Mississippi court was, whether certain grounds, within the town plat, had been dedicated to public use. The construction of the will was incidental to the main object of the suit, and of course was not binding on any one claiming under the will. With the greatest respect, it may be proper to say, that this court do not follow the state courts in their construction of a will or any other instrument, as they do in the construction of statutes.

Where, as in the case of *Jackson* v. *Chew*, 12 Wheat., 167, the construction of a will had been settled by the highest courts of the state, and had long been acquiesced in as a rule of property, this court would follow it, because it had become a rule of property. The construction of a statute by the Supreme Court of a state is followed, without reference to the interests it may affect, or the parties to the suit in which its construction was involved. But the mere construction of a will by a state court does not, as the construction of a statute of the state, constitute a rule of decision, for the courts of the United States. In the case of *Swift* v. *Tyson*, 16 Pet., 1, *the effect of the 34th section of the Judiciary [*477 Act of 1789, and the construction of instruments by the state courts, are considered with greater precision than is found in some of the preceding cases on the same subject.

The decree of the Circuit Court is reversed, and the cause is remanded to that court for further proceedings.

Mr Justice McKINLEY.

In this case I differ in opinion with the majority of the court, not only on the construction of the will, but upon a question of much greater importance, and that is, whether the construction given to this will by the Supreme Court of Mississippi is not binding on this court? I will proceed to the examination of these questions in the order in which I have stated them; and to bring into our view all the provisions of the will, which dispose of the real estate of the testator, I will state them in the order in which they stand in the will, unconnected with other provisions not necessary to aid in construing those relating to the real estate.

After the introductory part of the will, and providing for his funeral, the testator proceeds to dispose of his estate thus:

"Secondly, I will and bequeath to my beloved wife, Elizabeth Vick, one equal share of all my personal estate, as is to be divided between her and all my children, as her own right, and at her own disposal during her natural life; and also for the term of her life on earth, the tract of land at the Open Woods, on which I now reside, or the tracts near the river, as she may choose; reserving two hundred acres, however, on the upper part of the uppermost tract to be laid off in town lots, at the discretion of my executrix and executors.

"Thirdly, I will and dispose to each of my daughters, one equal proportion with my sons and wife, of all my personal estate, as they come of age or marry; and to my sons one equal part of said personal estate, as they come of age, together with all of my lands; all of which lands I wish to be appraised, valued, and divided, when my son Westley arrives at the age of twenty-one years; the said Westley having one part, and my son William having the other part of the tracts unclaimed by my wife, Elizabeth; and I bequeath to my son Newit, at the death of my wife, that tract which she may prefer to occupy. I wish it to be distinctly understood, that that part of my estate which my son Hartwell has received, shall be valued, considered as his, and as part of his portion of my estate.

"Fourthly, It is, however, furthermore my wish that the aforesaid Elizabeth should keep together the whole of my property, both real and personal, reserving the provisions before made for the raising, educating, and benefit of the before-mentioned children. I wish my executors, furthermore, to remember that the town lots now laid off, and hereafter *478] to be laid off, on the aforementioned two hundred *acres of land, should be sold to pay my just debts, or other engagements, in preference to any other of my property, for the use and benefit of all my heirs."

An inquiry which lies at the threshold of this investigation, is, what was the meaning and intention of the testator in reserving the two hundred acres of land, "to be laid off in town lots?"

Did he intend this tract, of two hundred acres, should not pass by his will, under the general description of "all my lands?" Or did he mean simply that it should be reserved from the use of his wife, in the event she selected the river tracts in preference to the Open Woods tract? Or did he intend, as the majority of the court have decided, that it should be reserved to be sold by his executors, for the purposes of paying his just debts and other engagements, "and" to increase the legacies of his daughters? To the last con-

struction there is a very material objection. The power of the executors to sell the lots laid off, and to be laid off, on the two hundred acres, is not absolute, but contingent. The testator did not direct that any of his property, real or personal, should be sold for the purpose of paying his debts, or for any other purpose. But his meaning and intention, as manifested by the language employed, is, that if, in the administration of his estate, it should become necessary to sell any portion of it for the payment of his debts or other engagements, he wished his executors to remember that the town lots then laid off, and thereafter to be laid off, should be sold "in preference to any other of (his) property."

If the debts and other engagements could have been satisfied without a sale of the lots, the executors would have had no power to sell them for any purpose whatever; and the words "for the use and benefit of all my heirs," would have been inoperative for the purpose to which they have been applied; and the bounty, which it is supposed by the court a father's heart could not withhold from his daughters, would have been entirely defeated; and in that event, the interpolation of the word "and," which has been supplied by the court, could not have conferred on the daughters the lots, nor the proceeds of the sale of them. But conceding the power to sell the lots for the payment of the testator's debts, do the words "for the use and benefit of all my heirs," give any authority to the executors to sell the remainder of the lots, after paying the debts, or any right to the heirs to receive the proceeds of such sale?

The court seem to admit, by their reasoning, that these words alone give no right to the heirs to claim the proceeds, nor power to the executors to sell the remainder of the lots, and, therefore, they have supplied the word "and," to unite the power granted to sell for the payment of debts, with the words "for the use and benefit of all my heirs," which, they say, completes the right to receive the proceeds. If the court have the right to alter the will, and then give construction to it, they make it mean what they please. *But [*479
I deny the power of the court, in such a case as this, to add the word "and." The rule is understood to be this: where there is a supposed mistake or omission, all the court has to do is to see whether it is possible to reconcile that part with the rest, and whether it is perfectly clear, upon the whole scope of the will, that the intention cannot stand with the alleged mistake or omission. *Mellish* v. *Mellish*, 4 Ves., 49. It appears to me these words are perfectly consistent with the other

parts of the will, and are by no means repugnant to the main intention of the testator, but perfectly consistent therewith.

His intention, as manifested by all the provisions of the will, appears to be, to divide his personal estate equally among his sons and daughters and his wife, and to divide all his real estate, or lands, equally among his sons. That he intended each son to take an equal part of his lands, is proved by the direction to have each portion valued. That half of the Open Woods tract was not equal in value to the two river tracts, excluding the two hundred acres to be laid off into lots, is clearly proved by the will itself; because the testator gives his wife her choice of the Open Woods tract, or the two tracts on the river; and whichever she selects is, at her death, to go to his youngest son, Newit, and the other to be divided between his sons Westley and William; and he further directs that the part which his son Hartwell had received, should be valued, considered his, and as part of his portion of the estate. Here is a clear and unequivocal intention manifested to give to each son an equal portion of his real estate; and it is as clearly manifested that the specific portions given are not equal. To maintain the construction given to the will by the court, the two hundred acres are excluded from the devise of all the testator's lands to his sons. And the question arises, and ought to have been decided, how are these portions to be equalized? If the two hundred acres passed to the sons by the devise, subject to the payment of debts, then a reasonably certain contingent means was afforded for equalizing the portions, by dividing and valuing the lots not sold to pay debts, to make up deficiencies.

This view alone is sufficient to satisfy my mind that all the lands passed to the sons by the general words, "all of my lands, all of which lands I wish to be appraised, and valued, and divided, when my son Westley arrives at the age of twenty-one years." Can the words "for the use and benefit of all my heirs," which in themselves contain no positive words of grant, control the previous, positive, and unconditional, grant of all his lands to his sons? It appears to me to be impossible to give such controlling influence to such words, upon any of the known and established rules of construction; and especially when they admit of a different interpretation, by which they would stand in perfect harmony with the other provisions of the will.

*480] The accounts settled by the executor, with the Orphans' Court, *and which are part of the record exhibited in the bill of complaint, show that between twenty-five thousand and thirty thousand dollars of the debts of the

estate were paid by the proceeds of the cotton crops; which proves that a large portion of the personal estate consisted of slaves. Is it not reasonable, therefore, to suppose the testator had in his mind the disadvantages that would result to all his children, if he should leave his slaves liable to be sold for the payment of his debts, when he ordered the lots, which were unproductive, to be sold for that purpose, "in preference to any other of his property" which was productive? Acting upon this view of his affairs, is it at all surprising that he should have inserted in his will, even by interlining, the words, "for the use and benefit of all my heirs," that being the reason which induced him to charge the debts upon the town lots?

But putting out of view all extraneous considerations, can the construction given by the court to this part of the will be sustained upon principle? Executors have no authority to sell real estate, unless the power to sell, and the purpose of the sale, are expressed in the will. Therefore the court cannot infer, from a power expressly granted to sell the estate for one purpose, a power to sell it for another purpose not granted. *Hill* v. *Cook*, 1 Ves. & B., 175. In the case under consideration, the only authority given by the will to sell the town lots, was for the payment of debts; and there the power of the executors to sell any portion of the estate terminated. When they had sold as many of the lots as were necessary to pay the debts, the remainder fell into the general devise of all the lands of the testator to his sons; and the purposes of the testator, in relation to his real estate, were accomplished, according to his plain intention, when all the provisions of the will are taken together.

To reserve the remainder of the lots from the general devise, and to give effect to the interlined words, different from their plain meaning, in the connection in which they stand with the other provisions of the will, the court revive the exhausted power of sale, and give capacity to all the heirs to take the proceeds of the sale of the remainder of the lots, by inserting the conjunction "and" between the power to sell the lots for the payment of debts and the interlined words; thereby changing the meaning of the whole sentence. This certainly is not construing the will; but it is making a will, and giving this portion of the testator's estate to his daughters, which he plainly intended for, and gave to, his sons.

This will was brought in question before the High Court of Errors and Appeals of the state of Mississippi, in the case of *Vick and others* v. *The Mayor and Aldermen of Vicksburg*, 1 How. (Miss.), 442. The question before that court was,

whether the land in controversy had been dedicated by Newit Vick, in his lifetime, to public purposes, or passed to, and was
*481] vested in his devisees by his will; and it is a part of the same land in controversy in the case *before this court; the court of Mississippi having concurrent jurisdiction of the subject-matter with this court, decided, that the whole of the real estate was devised to the sons of Newit Vick, deceased; and that his daughters were entitled to no part of the lots, nor any part of the proceeds of the sale of them. According to the Constitution and laws of the United States and previous decisions of this court, I think this court was bound to follow the decision of that court upon the construction of the will.

The 2d section of the 3d article of the Constitution of the United States declares, "The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state or the citizens thereof and foreign states, citizens, or subjects." In these three latter classes of cases, the jurisdiction of the courts of the United States is concurrent with the state courts. In this case it originated between citizens of different states, and is, therefore, concurrent with the courts of Mississippi. Before the jurisdiction here conferred on the courts of the United States could be exercised, it was necessary their powers and authority should be established and defined by law. And accordingly, by the 34th section of the act of Congress of the 24th of September, 1789, it is enacted, "That the laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." The purposes for which jurisdiction was given to the courts of the United States between citizens of different states in ordinary matters of controversy, between citizens of the same state claiming lands under grants from different states, and between an alien and a citizen of a state, was to give in each of these cases, at the option of the plaintiff, a tribunal, presumed to be free from any accidental state prejudice or partiality, for the trial of the cause.

And when Congress defined the powers of the courts of the United States, they directed, that the laws of the several states should be regarded as the rules of decision in suits at common law, in cases where they apply. And upon these principles, with few, if any exceptions, has this court acted from the commencement of the government down to the present term of this court. That they should continue so to act, is of great importance to the peace and harmony of the people of the United States. If the state judicial *tribunals establish a rule, governing titles to real estate, [*482 whether it arise under statute, deed, or will, and this court establishes another and a different rule, which of these two rules shall prevail? They do not operate like two equal powers in physics, one neutralizing the other; but they produce a contest for success, a struggle for victory; and in such a contest it may easily be foreseen which will prevail.

The state courts have unlimited jurisdiction over all the persons, and property, real and personal, within the limits of the state. And as often as the courts of the United States have it in their power, by their judgments, under their limited jurisdiction, to turn out of the possession of real estate those who have been put into it by the judgment of the highest court of appellate jurisdiction of the state, so often that possession will be restored by the same judicial state power. To avert such a contest, and in obedience to the act of Congress before referred to, this court have laid it down, in many cases, as a sound and necessary rule, that they should follow the state decisions establishing rules and regulating titles to real estate. And in the following cases they have applied the rule to the construction of wills, devising real estate. In *Jackson* v. *Chew*, 12 Wheat., 162, the principle is fully maintained. In that case the court say, "The inquiry is very much narrowed by applying the rule which has uniformly governed this court, that where any principle of law, establishing a rule of real property, has been settled in the state courts, the same rule will be applied by this court, that would be established by the state tribunals. This is a principle so obviously just, and so indispensably necessary under our system of government, that it cannot be lost sight of." The question in that case arose upon the construction of a will devising land in New York. In the case of *Henderson and wife* v. *Griffin*, 5 Pet., 154, the court say, "The opinion of the court in the case of *Kennedy* v. *Marsh* was an able one; it was the judicial construction of the will of Mr. Laurens, according to their view of the rules of the common law in that state, as a rule of property, and comes within the principle adopted in *Jackson*

v. *Chew*, 12 Wheat., 153, 167." These cases are in strict conformity with the 34th section of the act of the 24th September, 1789, above referred to.

There are many other decisions of this court applicable to this case; some of them have followed a single decision of a state court, where it settled a rule of real property. And at the present term of this court, in the case of *Carroll* v. *Safford, treasurer, &c.*, it was held, that it was not material whether it had been settled by frequent decisions, or a single case. From these authorities, it is plain, the jurisdiction of this court is not wholly concurrent in this case with the Supreme Court of Mississippi; but in power of judgment it is subordinate to that court, and, therefore, the construction *483] *given by that court to the will ought to have been the rule of construction for this court.

Mr. Chief Justice TANEY concurred in the opinion of Mr. Justice MCKINLEY.*

FRANCIS C. BLACK AND JAMES CHAPMAN, PLAINTIFFS IN ERROR, *v.* J. W. ZACHARIE & CO., DEFENDANTS.

When a creditor, residing in Louisiana, drew bills of exchange upon his debtor, residing in South Carolina, which bills were negotiated to a third person and accepted by the drawee, the creditor had no right to lay an attachment upon the property of the debtor, until the bills had become due, were dishonored, and taken up by the drawer.

By the drawing of the bills a new credit was extended to the debtor for the time to which they run.[1]

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*On the trial of this case, Mr. Justice STORY was absent; four of the judges, therefore, ruled the decision.

[1] The acceptance by the creditor of the note of the debtor, or the drawing of a bill of exchange by the creditor, which is accepted by the debtor, does not extinguish the original debt, *Ex parte Barclay*, 7 Ves., 597; *Lyman* v. *Bank*, 12 How., 225; *Morrison* v. *Smith*, 81 Ill., 221; *Shepard* v. *Allen*, 16 Kan., 182; *Devlin* v. *Chamblin*, 6 Minn., 468; *Wadlington* v. *Covert*, 51 Miss., 631; *Breitung* v. *Lindauer*, 37 Mich., 217; *Christian* v. *Newbury*, 61 Mo., 446; *Bradford* v. *Fox*, 38 N. Y., 289; but only suspends the right of action until the note or bill is dishonored. *Armistead* v. *Ward*, 2 Patt. & H. (Va.), 504; *Van Epps* v. *Dillaye*, 5 Barb. (N. Y.), 244; *Putnam* v. *Lewis*, 8 Johns. (N. Y.), 389; *Stedman* v. *Gooch*, 1 Esp., 3; *Kingslake* v. *Morgan*, 5 T. R., 513; *Griffith* v. *Owen*, 13 Mees. & W., 58; *Phœnix Ins. Co.* v. *Allen*, 11 Mich., 501; *Price* v. *Price*, 16 Mees. & W., 231; *Maier* v. *Canovan*, 57 How. (N. Y.) Pr., 504; and the reason for this rule is, that the holder might transfer the note or bill to a *bona fide* purchaser, and then subject the debtor to payment of both the original and the new debt. *Moses* v. *Trice*, 21 Gratt. (Va.), 556; *Aultman* v. *Jett*, 42 Wis., 488; *Merrik* v.

The laws of Louisiana, allowing attachments for debts not yet due, relate only to absconding debtors, and do not embrace a case like the above.

The legal title to stock held in corporations situated in Louisiana, does not pass under a general assignment of property, until the transfer is completed in the mode pointed out by the laws of Louisiana, regulating those corporations.[2]

But the equitable title will pass, if the assignment be sufficient to transfer it by the laws of the state in which the assignor resides, and if the laws of the state where the corporations exist do not prohibit the assignment of equitable interests in stock. Such an assignment will bind all persons who have notice of it.[3]

The laws of Louisiana do not prohibit the assignment of equitable interests in the state by residents of other states.

Personal property has no locality. The law of the owner's domicil is to determine the validity of the transfer or alienation thereof, unless there is some positive or customary law of the country where it is found to the contrary.[4]

Boury, 4 Ohio St., 60; *McIntyre* v. *Kennedy*, 29 Pa. St., 448; *Syracuse R. R. Co.* v. *Collins*, 57 N. Y., 641; *Foster* v. *Hill*, 36 N. H., 526; *Caldwell* v. *Fifield*, 4 Zab. (N. J.), 150. The giving of a note or bill is sometimes said to be a conditional payment. *Belshaw* v. *Bush*, 11 Com. B., 205, (73 Eng. Com. L., 205); *Sweet* v. *James*, 2 R. I., 270; *Mooring* v. *Mobile Co.*, 27 Ala., 254; *Higgins* v. *Wortell*, 18 Cal., 330; *Bill* v. *Porter*, 9 Conn., 23; *Ward* v. *Evans*, 2 Ld. Raym., 928. So the action for the original debt is equally suspended if a note of a third person is taken for such debt. *Ford* v. *Beech*, 11 Q. B., 867. (63 Eng. Com. L., 867); *Belshaw* v. *Bush*, 73 E. C. L., 205; *Peter* v. *Beverly*, 10 Pet., 532; *Fickling* v. *Brewer*, 38 Ala., 685; *Clarke* v. *Savage*, 20 Conn., 258; *Brown* v. *Olmstead*, 50 Cal., 162; *Graham* v. *Skyer*, 15 La. Ann., 49; *Huse* v. *McDaniel*, 33 Iowa, 406; *Guion* v. *Doherty*, 43 Miss., 538; *Powell* v. *Charless*, 34 Mo., 485; *League* v. *Waring*, 85 Pa. St., 244; *Watson* v. *Owens*, 1 Rich. (S. C.), 111; *Nightingale* v. *Chaffee*, 11 R. I., 609; *Bates* v. *Rosekrans*, 37 N. Y., 409.

If something else was to have been done besides the mere giving of the note or bill, and that something is not performed, the cause of action on the original debt is not suspended. *Putnam* v. *Lewis*, 8 Johns. (N. Y.), 389; see *Norris* v. *Aylette*, 3 Campb., 329. The taking of the note or bill for a debt secured by a sealed instrument is said not to suspend the cause of action. *Drake* v. *Mitchell*, 3 East, 251; *Curtis* v. *Rush*, 2 Ves. & B., 416; nor prevent distress for rent. *Brown* v. *Gilman*, 4 Wheat., 256; *Davis* v. *Gyde*, 2 Ad. & E., 623.

[2] APPLIED. *Cronin* v. *Patrick Co.*, 4 Hughes, 532.

[3] CITED. *Walker* v. *Detroit Transit R'y Co.*, 47 Mich., 347; *Beckwith* v. *Burrough*, 13 R. I., 298.

[4] It is a general law of contracts that a contract valid at the place where it is entered into, is valid in all other places, and the courts of all other places will enforce it when called upon by the complaining party. This general rule is extended to all assignments of property. "The deed in question having been made in the state of Virginia, and by a corporation created by the laws of that state, its validity must depend upon those laws. It is a general principle, admitting of few exceptions, that in construing contracts made in a foreign country, the courts are governed by the *lex loci* as to the essence of the contract; that is, the rights acquired and the obligations created by it." *Baltimore, &c. R. R. Co.* v. *Glenn*, 28 Md., 287. See *DeSobry* v. *DeLaistre*, 2 Har. & J. (Md.), 191; *Washer* v. *Everhart*, 3 Gill. & J. (Md.), 244; *Hall* v. *Mullen*, 5 Har. & J. (Md.), 193; *Hanford* v. *Paine*, 32 Vt., 442; *Moore* v. *Willett*, 35 Barb. (N. Y.), 663; *Guillander* v. *Howell*, 35 N. Y., 657; s. c. 6 Am. L. Reg., 522, and note; *Ockerman* v. *Cross*, 54 N. Y., 29.

So the general rule is that an assignment of property, either voluntary or under a statute authorizing it for a division among creditors, valid in the state where assigned, is also valid as to property situate in another state, unless the laws of the latter state ren-

Black et al. v. Zacharie & Co.

THIS case was brought up by writ of error from the Circuit Court of the United States for East Louisiana.

It was an attachment issued originally by the Commercial Court of New Orleans, (a state court,) against the goods and chattels, lands and tenements, rights and moneys, effects and credits, of Black, at the instance of Zacharie & Co., and removed, on the petition of Black, into the Circuit Court of the United States.

Black resided in Charleston, South Carolina, and Zacharie & Co. in New Orleans.

In 1837, Black was the owner of five hundred shares of the capital stock of the New Orleans Gas Light and Banking Company, and six hundred shares of the Carrollton Bank of New Orleans. On the 31st of May, in that year, he assigned
*484] to the Bank of South *Carolina, as security for a loan, his shares in the Gas Light and Banking Company, with power to sell, if necessary.

The shares in the Carrollton Bank were mortgaged to that bank.

Zacharie & Co. and Black were in commercial correspondence from 1835 to 1840, and a number of letters were inserted in the record. The point of law, however, which was based upon those letters, having been decided by the court below, and the decision not excepted to, it is unnecessary to recite their contents.

In the early part of 1841, Zacharie & Co. shipped to Black a cargo of sugar and molasses, which was sold from time to time, beginning with January the 25th, and ending with April 9th, partly for cash and partly on time.

The following bills of exchange were drawn by Zacharie & Co., on Black:

February 17th, at sixty days after sight,	$1,500 00
February 18th, " " " "	1,500 00

der the assignment void; such a law must be a statute. *Caskie* v. *Webster*, 2 Wall. Jr., 131; *Law* v. *Mills*, 18 Pa. St., 185; *Guillander* v. *Howell*, 35 N. Y., 657; s. c. 6 Am. L. Reg., 522, and note; *Frazier* v. *Fredericks*, 4 Zab. (N. J.), 166; *Varnum* v. *Camp*, 1 Gr. (N. J.), 329; *Livermore* v. *Jenckes*, 21 How., 126; *Crapo* v. *Kelly*, 16 Wall., 610, reversing 45 N. Y., 86. The assignee takes a title superior to the lien of a subsequent attaching creditor. *Kelstadt* v. *Reilly*, 55 How. (N. Y.) Pr., 373; *Moore* v. *Willett*, 35 Barb. (N. Y.), 363; *Kelly* v. *Crapo*, 45 N. Y., 86, (not reversed upon this point.) But a transfer of such property giving preference to local creditors is void as to foreign creditors with respect to property situate in another state. *Moore* v. *Bonnell*, 2 Vr. (N. J.), 90; *Varnum* v. *Camp*, 1 Gr. (N. J.), 326; *Zipey* v. *Thomson*, 1 Gray (Mass.), 243; *Miner* v. *Beste*, 32 Mo., 240; yet not as to property conveyed into another state by the transferrer or a third person. *Jones* v. *Taylor*, 30 Vt., 42; *Baker* v. *Stacy*, 25 Miss., 477; *Ferguson* v. *Clifford*, 37 N. H., 87.

February 24th, at sixty days after sight,					2,000 00
March 1st,	"	"	"	"	2,000 00
April 1st,	"	"	"	"	1,088 25

They were all drawn in favor of Alexander McDonald, and accepted by Black. The two first fell due on the same day, viz.: on the 30th April, 1841, and were protested.

On the 15th April, 1841, Black executed a power of attorney, appointing the cashier of the Gas Light and Banking Company his agent, to transfer the five hundred shares of stock standing in his name to the Bank of South Carolina.

On the 16th of April, 1841, this power was forwarded by the Bank of South Carolina to the cashier of the Gas Light and Banking Company, with a request that the transfer might be immediately made, and a new certificate issued.

On the 28th of April, 1841, Black made a general assignment of all his property to James Chapman, for the benefit of all his creditors, mentioning particularly the five hundred shares of stock in the Gas Light and Banking Company, subject to the mortgage before-mentioned to the Bank of South Carolina, and the six hundred shares in the Carrollton Bank, subject to a mortgage to the Carrollton Bank. These mortgages the trustees were directed to pay off, and divide the surplus amongst the creditors named in a schedule annexed to the deed, including Zacharie & Co.

On the same day Black addressed a letter to Zacharie & Co., informing them of what he had done, and that he had sent the assignment to Messrs. J. H. Leverich & Co. He said also—

Your two drafts, $1,500 each, fall due on the 30th inst.

Your one draft, $2,000, falls due on the 7th May.

Your one draft, $2,000, falls due on the 3d June.

Your one draft, $1,088, falls due on the 14th June.

On the 4th of May, 1841, Zacharie & Co. filed an affidavit for *the purpose of obtaining from the Commercial Court of New Orleans, as before stated, an attachment against the goods and credits of Black. The necessary bond was given, and the attachment laid in the hands of the Carrollton Bank, and of the Gas Light and Banking Company. [*485

On the 5th of May, 1841, Zacharie & Co. addressed to Black a letter, from which the following is an extract:

"FRANCIS C. BLACK, Esq.

"DEAR SIR:—Yours of the 28th ultimo came to hand yesterday morning at the opening of the post-office, and immediately after the shock the writer experienced, he called on our attorney, and in less than ten minutes we had an attachment

levied on your stocks, both of the Carrollton and Gas Banks, and am happy to say that our attorney assures us that we have succeeded it in spite of our assignment, which is worthless in our state, particularly as no transfer had taken place on the books of the bank; this course we feel satisfied you must approve of, as it certainly will relieve you from the very unhappy and truly inevitable dilemma of throwing upon your friend, who to serve you has, without compensation, accepted for your accommodation upwards of $3,000, a loss to that amount. A neglect to provide for this sacred and confidential debt, you could not be sustained in by your best friend; and indeed we cannot but believe you will be happy to learn the course we have pursued, and we now hope that your assignee will urge a decision as soon as practicable, as it is useless to procrastinate the matter longer than necessary."

On the 5th of May, 1841, J. H. Leverich addressed letters to the cashier of the Carrollton Bank, and of the Gas Light and Banking Company, requesting them to transfer the stock in their respective institutions, standing in the name of Black, to Chapman, his assignee; to which the following answers were returned:

"*Gas Light and Banking Company,*
"*New Orleans, May 5th,* 1841.

"Messrs. JAMES H. LEVERICH & Co.

"GENTLEMEN:—In answer to your note of this date, I have to say, that on the 22d ult. I received a letter from J. Chapman, cashier of the Bank of South Carolina, covering a certificate of five hundred shares of the stock of this institution, in favor of Francis C. Black, together with a power from said Black to me to transfer the stock to the Bank of South Carolina; that said power being not considered sufficiently formal, (although it might be thought so by persons less rigid than myself in matters of the kind,) was returned to the Bank of South Carolina, with the remark, that upon another being furnished in conformity with corrections which were stated on the face of the one returned, the desired certificate would be transmitted.

"On the 4th inst., a notice of seizure, of all effects or property of said Black, in this bank, under an attachment was served; *486] consequently, *under all these circumstances, we cannot consent to the transfer requested in your note, but must hold the stock, subject to the decision of the courts.

"Respectfully, your obedient servant,
(Signed) "J. W. HOUSTON, Cashier."

"*Carrollton Bank,*
"*New Orleans, 7th May,* 1841.

"GENTLEMEN:—Your application, of date 5th inst., to transfer six hundred shares and stock, standing in the name of F. C. Black, by virtue of a power from James Chapman, as his assignee, is noted. The transfer cannot be allowed, because that said stock has been attached at the suit of J. W. Zacharie & Co., served on the 4th inst., and also for the reason that said stock is pledged to this bank for a stock loan.

"Very respectfully,
(Signed) "JOHN NICHOLSON, Cashier.
"Messrs. J. H. LEVERICH & Co., New Orleans."

On the day when the attachment was issued, the court appointed counsel to represent the absent defendant, and on the 12th June, 1841, that counsel filed an answer on behalf of Black, but without instructions from him.

On the 19th of November, 1841, Black filed a petition praying that the cause might be removed into the Circuit Court of the United States, and it was accordingly removed.

On the 7th of December, 1841, Black prayed oyer of the bills of exchange, and Chapman filed a petition of intervention, in which he set forth the assignment to him by Black on the 28th of April, claimed the shares of stock in consequence thereof, and prayed that the attachment might be dissolved. Zacharie & Co. appeared to the intervention, and denied all the allegations in the petition except that the stock had been attached and the case removed.

The notes were filed in conformity with the prayer for oyer.

On the 28th of December, 1841, Black filed the following exceptions and answer:

"And now into the ninth Circuit Court of the United States, for the eastern district of Louisiana, comes Francis C. Black, the defendant in said suit, by his attorneys, and excepts to the order and writ of attachment granted therein, to the petition and the demand therein made, and for cause of exception, avers that at the institution of said suit the plaintiffs therein had no cause of action whatever against this defendant, and that no debt was at the date of said suit due by defendant to said plaintiff, all of which is apparent by the petition of said plaintiff, and the account and bills of exchange annexed and referred to; wherefore defendant prays that said writ of attachment be set aside and dismissed, and that said suit be dismissed.

"But if the said exception be overruled, then this defendant answers to said suit, and denies all and singular the

*allegations in plaintiff's petition contained, and denies specially being indebted to said plaintiffs as alleged in said petition; and defendant further pleads that the bank-stock attached in this case was not, at the date of said attachment, the property of defendant, or liable to be attached for any debt by him owing, and that the said stock was then the property of James Chapman of South Carolina, who became the owner thereof under a trust-deed for the benefit of all the creditors of defendant without distinction, executed in Charleston, South Carolina, on the 28th April, 1841, and that said stock was delivered to said Chapman before the issuing of the attachment in this case. Defendant further shows that the said trust-deed was executed in due form of law in South Carolina, where defendant resides, and that the same is effectual to pass the said stocks both in said state where it was executed and in this state; and that before the attachment in this case, the plaintiffs were notified of said assignment, and that the Gas Bank and the Carrollton Bank were also notified of said assignment immediately after the execution thereof. Wherefore defendant prays that plaintiffs' demand be dismissed."

On the 18th of January, 1842, the court overruled these exceptions.

In March, 1842, the cause came on for trial, when the jury on the 5th of March found a verdict for the plaintiffs Zacharie & Co. against the defendant, Black, for the sum of $8000.

A motion for a new trial was made, but overruled.

Before stating the bills of exception which were taken on the trial, it is proper to mention that the depositions of three members of the bar of South Carolina were read in evidence to show what the law was in that state. The following is an extract from that of J. L. Pettigru:

"That he, the witness, knows that the said Francis C. Black immediately advised the plaintiffs in this cause of his assignment, and that, in consequence thereof, they laid their attachment, for he, the witness, has seen the letter of the said Francis C. Black to the said J. W. Zacharie, and the answer to it, and he advised the assignee, as well as Mr. Black, to inform all the creditors immediately of what has been done. But by the law and usage of South Carolina, no act of the *cestui que trust*, or creditor in whose favor an assignment is made, is necessary either to entitle them to the benefit of its provisions, or give validity to the deed; and that the assignor and assignee were advised by the witness to give the creditors notice, because, in a business point of view, it is right and proper always to inform a correspondent or creditor of that

which concerns his interest; and because, by an act of Assembly of this state, (Statutes of South Carolina, vol. 6, p. 365,) it is made the duty of an assignee to call the creditors together within ten days after the execution of the assignment, to appoint agents on their part, equal in *number to the assignee, with equal authority in the execution of the trust; but if the assignee neglects his duty, the deed is not thereby invalidated, but the creditors may appoint their agents, and take the whole property out of the hands of the assignee, and apply the same according to the provisions of the deed. [*488

"And the witness says that he has practised in the courts of South Carolina for nearly twenty-nine years as a solicitor and counsellor, and he deems himself qualified to express an opinion on the law of South Carolina. That, by the common law, as known and administrated in South Carolina, an assignment completely diverts the property from the execution of the deed, so that it cannot be questioned by the assignee himself, and, if free from fraud, cannot be questioned by his creditors or anybody else, and that though such assignment be made abroad, it passes the property of the debtor in South Carolina from the instant of its execution, and no subsequent attachment can disturb the right of the assignee. That this principle was denied as long ago as the year 1816, in the case of *Prime* v. *Yates*, Treadw. (S. C.), 770. That the distinction between an assignment of the party and one by operation of law, was taken and recognized in *Topham* v. *Chapman*, 1 Constitutional Report, 283, decided in the year 1817. That this decision was followed in *Brown* v. *Minis*, 1 McCord (S. C.), 106, though the point there was not considered one of any difficulty, the controversy in that case turning on other questions involved. But the very question between an assignment of property in South Carolina, executed in New York, in trust for creditors, and an attachment laid on the property of the assignor in South Carolina after the date of the assignment, was raised in *West* v. *Tapper*, in the year 1829, and was decided in favor of the assignment, in which case his honor, Judge Gilchrist, of the United States Court, then at the bar, was of counsel for West, the assignee: see 1 Bail. (S. C.), 193. That the question was made again in *Green* v. *Maury*, decided in the year 1831, and again decided that a *bona fide* assignment in trust for creditors (though made out of the state, and of the property within the state,) takes precedence of a subsequent attachment. That since that time the point has not, as far as witness knows, been questioned, although property to an immense amount has been passed by such assignments, and

so well settled is the law on the subject, that if the situation of these parties were reversed, and the plaintiffs, by a *bona fide* assignment in Louisiana, had conveyed their property in South Carolina, whether consisting of real or personal estate, or choses in action for the payment of debts, no lawyer of reputation could be found to advise a creditor in this state to attempt to take the property by a subsequent execution or attachment. That in the case of the assignment of stocks, though they can only be transferred on the books of the bank itself, yet the assignee would be entitled to call for a transfer, and no creditor by any attachment subsequent to *489] *the deed of assignment could prevent the assignee from taking the stocks, and disposing of them according to the trusts of the deed, and that in the decision of the question, it is perfectly immaterial whether the assignee be in actual possession of the property assigned when such property is capable of manual delivery, or whether the transfer be completed on the books of the bank when the property is of such a nature as to require such transfer, for in all cases the right of property is in the assignee from the date of the deed, and there is nothing for the attachment to act upon.

Mr. McCrady says, "that he has read the deposition of Mr. Pettigru, and concurs fully in the opinion expressed by him."

Mr. Henry Bailey also concurs, and adds, "that no assent or other act on the part of the assignee, or *cestui que trust*, is necessary to give validity to an assignment for the benefit of creditors, unless such assent or act is made a condition precedent by the express provisions of the deed of assignment, in which case the conventional law of the parties supersedes the general law of the land; that the assignment takes effect from its execution, and although executed in a foreign country, prevails over a subsequent attachment or assignment in South Carolina; that this principle applies only to voluntary assignments by the debtor, and not to assignments by operation of the foreign laws of a country, such as the bankrupt law of England; that the cases cited by Mr. Pettigru in his foregoing deposition are of unquestionable authority in South Carolina, two of which were reported by this witness when he held the office of State Reporter; that the same principles have been recognized in various adjudications since, and are universally regarded by the bar of this state as settled and familiar law."

The following are the bills of exceptions to the ruling of the Court upon the trial:

"Be it known, that on the trial of this case the plaintiffs offered in evidence the following bills of exchange, to wit:

One of 17th February, protested 30th April, 1841,	$1500	00
One of 18th February, protested 30th April, 1841,	1500	00
One of 24th February, protested 7th May, 1841,	2000	00
One of 24th March, protested 3d June, 1841,	2000	00
One of 1st April, protested 14th June, 1841,	1088	25

"And before said drafts were offered in evidence, it was proved by the testimony of a witness, that each of said drafts had been negotiated by the plaintiffs; that the two drafts of $1500 each were returned under protest, and taken up by the plaintiffs on the 7th May, 1841; the draft of $2000, protested on the 7th May, was returned and taken up on the 17th May, 1841; the draft for $2000, protested on the 3d June, 1841, was returned and taken up on the 10th June, 1841; and the draft for $1088.25 was returned and taken up by the plaintiffs on the 30th June, 1841. And before the said drafts were offered in evidence, the said plaintiff also introduced [*490 *the account sales, marked 'A;' the letter of the defendant on file, of date the 28th April, 1841; and the deed of assignment executed in Charleston on 28th April, 1841. All of which, to wit, the said bills of exchange, the account sales marked 'A,' the said letter, and the said assignment, are prayed to be taken as a part of the bill of exceptions; and the counsel for the defendant thereupon objected to the said bills of exchange as evidence in this case, and denied the plaintiffs the right to present them to the jury, on the ground that by said bills of exchange, and said testimony connected therewith, it fully appeared that the indebtedness of defendant to plaintiff, thus attempted to be proved, arose after the institution of this suit, and said bills were, consequently, no evidence in this cause; but the said objection was overruled, and the plaintiffs were permitted to present the said drafts and protests to the jury as evidence, and the defendant's counsel thereupon took this bill of exceptions. The plaintiff's petition and the account current annexed thereto had, before the said bills were offered, been read to the jury as pleadings, but not as evidence.

"THEO. H. MCCALEB, [SEAL.]"

A great number of letters were then given in evidence, and made a part of the exception. Some of them have been already quoted; those which have not, were intended to show an agreement between Zacharie & Co. and Black, that the former should hold the stock as security for advances which they alleged themselves to have made to Black. But the court, by granting the ninth prayer asked by the intervenor, decided this point against Zacharie & Co., whose counsel did

not except to the opinion of the court. The papers, therefore, need not be further noticed.

The defendant, Black, and the intervenor, Chapman, offered separate prayers to the court, viz.:

The defendant prays the following instructions to the jury:

"1. That the drawing, negotiations, and acceptance of bills of exchange operate a complete transfer of the funds of the drawer in the hands of the acceptor, up to the amount of the bills so drawn and accepted.

"2. That after the negotiation and acceptance of such bills, the drawer ceases to be a creditor of the acceptor for the amount thereof, and has no right of action against the acceptor for said amount.

"3. That the plaintiff's account annexed to this petition, in which the proceeds of sugar and certain advances are charged on one side, and certain bills of exchange are credited on the other, is an admission that said proceeds and advances constituted the final against which said bills were drawn.

"4. That if the jury believe, from the evidence before them, that such bills have been drawn, negotiated, and accepted, the *491] said drawing, negotiation, and acceptance transferred to the payee of said *bills so much of the said fund against which they were drawn as is represented by said bills.

"5. That if the jury believe, from the evidence before them, that at the date of the institution of this suit the plaintiffs had drawn and negotiated such bills, and were not then the holders thereof, then the jury must reject from the plaintiff's demand the amount of said bills, although it should have been proved that subsequently to the institution of this suit, to wit, upon the return of said bills under protest, the plaintiffs took up the same, and became the owners thereof.

"6. That a suit upon an account, the items of which consist of the amounts of certain bills of exchange, and that a suit upon such bills, cannot be maintained, unless the plaintiff in the suit is the holder of the bill at the date of the institution of his suit."

The intervenor prays the following instructions:

"1. That a *bona fide* assignment of property by a debtor for the equal benefit of all his creditors is not unlawful, but is highly favored by the law.

"2. That the law presumes an assent of creditors to such an assignment, unless their dissent is proved, and that the creditors who assent acquire, from the date of the assignment, an interest in the property which cannot be destroyed by a subsequent attachment of any single creditor.

"3. That from the date of the assignment the title of the

assignor is divested and the property assigned and delivered is not liable to attachment for his debts, and that bank stocks are incorporeal rights, the deriving of which passes by the delivery of the title or act of transfer.

"4. That if the certificates of the stocks are not in the possession of the owner, but in the possession of other persons, to whom he has pledged them, said owner may make a valid transfer, and an effectual and complete delivery of such stock, by delivering to the vendee or assignee a written title to the same, and that such title passes all the interest of the assignor.

"5. That the provisions in the charters of the Carrollton and Gas Banks, to the purport that the transfer of stocks in those banks shall not be effectual or valid, until entered upon the books of the banks, are introduced solely for the protection of the interests of said corporations, and for purposes connected with the elections thereof; but that said provisions do not in any wise alter or affect the general laws touching the delivery of incorporeal rights or stocks in said banks.

"6. That a sale or assignment of stocks in said banks, and the delivering of the title to the same, makes the assignee or vendee the owner of the same, although the transfer should not have been entered upon the books of the bank, subject only to such rights or equities as said banks themselves may have or possess upon said *stocks, and that the [*492 vendee or assignee may force the bank to enter such transfer upon their books.

"7. That if the jury believe, from the evidence before them, and especially from the act of assignment, and the depositions of witnesses taken in Charleston, South Carolina, on file and offered in evidence, that on the 28th day of April, 1841, the defendant, being domiciliated in the state of South Carolina, and being indebted to sundry persons in the amount stated in said depositions, and being the owner of the six hundred and sixty shares of the stock of the Carrollton Bank, and five hundred shares of the stock of the Gas Bank, executed and delivered to the intervenor a deed of assignment of said stocks *bona fide*, and for the benefit of all his creditors; that said stock was, after said date, attached by the plaintiffs; that no creditor is shown to have objected to said transfer, except the plaintiffs; that other creditors are proved to have excepted; that the certificates of said stock were not, on the date aforesaid, in possession of said defendant, by reason of his having pledged them respectively to the Bank of South Carolina and the Carrollton Bank; that then the delivery of said deed of assignment constituted a complete and legal delivery of said

stocks to the intervenor for the benefit aforesaid; and the jury must find for the said intervenor.

"8. That if the jury believe, from the evidence, and especially from the letter of the plaintiffs of date the 5th May, 1841, on file, that the plaintiff had been notified of the assign ment made as aforesaid, and thereupon and afterwards levied an attachment, then that such attachment was invalid, and cannot be sustained.

"9. That the letters of F. C. Black, dated at Charleston, South Carolina, on the 11th January, 1837, and at Macon, Georgia, on the 13th May, 1837, on file and in evidence, do not in law amount to a contract, agreement, or understanding that the stock of the Carrollton Bank should be held by plaintiffs as a security or pledge for the debt claimed by the plaintiffs in this suit, and that no such agreement between the defendant and plaintiff (if the jury believe that any such agreement existed) can avail in law against the intervenor in this case, representing the other creditors, unless the jury find from the evidence that such agreement was made in the form of a pledge, as prescribed in act 3125 of the Civil Code of Louisiana."

And afterwards, to wit, on the 5th March, 1842, the following bill of exceptions was filed:

"Be it known, that on the trial of this case, and after the argument, the counsel of defendant and the intervenor prayed the instructions of the court to the jury, to the purport of the written request on file, numbered from 1 to 6 for the defendant, and from Nos. 1 to 9 for the intervenor; and the court having granted and given to the jury all the instructions prayed for, except those designated as Nos. 3, 4, 5, 6, and 7, prayed by the intervenor; and the court refused
*493] *to give the said charges as demanded, but gave them with the qualification, as to all said instructions, that the delivery of the stock was not complete, and did not pass to the assignee, unless the transfer was entered upon the books of the bank; and that the laws of Louisiana alone, and not the laws of South Carolina, or the general commercial law of the United States, were to be regarded in the decision of this suit; to which qualification the counsel of the intervenor takes this bill of exceptions, and prays that said instructions, as prayed for, be taken as a part thereof."

On the 24th of March, 1842, Black prayed that a writ of error be allowed; and tendered a bond, with James H. Leverich & Co. as securities, in the penal sum of $500, with a condition that he should prosecute his writ of error to effect,

and answer all costs. Whereupon the judge issued the following order:

"Be it so, on the petitioner's giving bond, with J. H. Leverich & Co. as security, as the law directs, in the sum of five hundred dollars."

Chapman also prayed for a writ of error, "and that the said writ operate supersedeas of any further proceedings of J. W. Zacharie & Co. against the bank stock attached in said cause, and claimed by your petitioner as plaintiff in said intervention, until the final decision of the said cause in the Supreme Court of the United States." Whereupon the judge issued the following order:

"A writ of error is allowed as a supersedeas, on petitioner's giving bond, conditioned according to law, with J. H. Leverich & Co. on the same, of five hundred dollars.

(Signed) "THEO. H. MCCALEB, U. S. Judge.

"*March 28th*, 1842."

On the next day, viz., the 29th of March, the following order was passed:

"On motion of George Strawbridge, Esq., for plaintiffs, ordered, that so much of the order of this court as grants a supersedeas to the intervenor, Chapman, on his giving bond in the sum of five hundred dollars, be annulled; the court being of opinion that the stocks attached are not sufficient security for said writ of supersedeas."

The court afterwards re-opened this matter, upon motion of Chapman's counsel, but, after hearing an argument, declined to change the last quoted order, and refused to restore the supersedeas, upon the ground that the "bond was considered as insufficient."

Wilde, for plaintiffs in error.

Coxe, for defendants in error.

But before the case was reached in order,

Wilde, on behalf of the plaintiffs in error, moved [*494 that this court *do issue a writ of supersedeas upon the judgment, upon two grounds:

1. Because, within the time allowed by law, the writ of error had been prayed for, citation issued, and bond given, with adequate security.

2. Because, before the sale of the stocks by the marshal, Black applied for the benefit of the bankrupt act, to the District Court of South Carolina.

In support of this motion, Mr. *Wilde* said:

That the court erred in refusing a supersedeas, we regard it as settled by *Stockton & Moore* v. *Bishop*, 2 How., 74.

Nor is it a matter of indifference that the execution should be superseded. It may be that the stocks have been sold at a most unfavorable period, and bought in by the plaintiffs in attachment themselves. It may be that they would now satisfy the attaching creditor's demand, and leave a large surplus. Such considerations can weigh nothing with this court. It is quite enough that we were entitled to a supersedeas, and the court below refused it.

Your honors will remark the stocks were in the custody of the law.

The fund, therefore, was secure. It was competent for the court to order a sale of the property, on proof that it was perishable, or deteriorating in value.

Against the intervenor no judgment could be given, except for costs; and a bond for $500, with unquestioned and unquestionable surety, was undoubtedly sufficient.

That the intervenor is a plaintiff, see 2 Dorret, 676; the proposition asserted in argument, and not denied in this court, in *Livingston* v. *D'Orgenois*, 7 Cranch, 581.

Our Supreme Court have determined that plaintiffs are bound to give security only for costs, to entitle them to a suspensive appeal. *Heath & Co.* v. *Vaught et al.*, *Dougherty & Co. intervenors*, 16 L. R., 520, 1.

Even if the execution has been levied and the stocks sold, the party is still entitled to restitution. Tidd P., 1033, 1186, 1187; 2 Salk., 588; 2 Bac. Abr., 232; Cro. Jac., 246, 698.

Upon this preliminary point, Mr. Justice STORY delivered the opinion of the court.

This is a case coming by writ of error to this court, from the Circuit Court of the eastern district of Louisiana. The case has not as yet been heard upon the merits, but a motion has been made in behalf of the plaintiffs in error, (the original defendant and the intervenor,) for a writ of supersedeas to the execution issued upon the judgment against Black, upon two grounds; first, that the execution issued improvidently, because within the ten days allowed by law, the writ of error had been prayed for, citation issued, and bond given, with adequate security; secondly, that after the execution
*495] issued, *and certain stocks had been seized thereon, and before the sale thereof by the marshal, Black (who is a citizen of South Carolina) applied for the benefit of the Bankrupt Act to the District Court of South Carolina district,

and was afterwards declared a bankrupt, and an assignee appointed; and that, in the intermediate period, the marshal sold the stocks.

Upon examining the record, we find that, although the writ of error had been allowed by the Circuit Court, and a citation issued, and bond given for prosecution of the writ of error and payment of costs, and a supersedeas had afterwards been awarded to stay execution, yet that the court upon the succeeding day revoked that order, upon the ground that the stocks attached were not a sufficient security for the said writ of supersedeas, and that the bond was insufficient; so that the case does not fall within the predicament provided for in the 22d and 23d sections of the Judiciary Act of 1789, chap. 20, which entitles the party to a supersedeas and stay of execution, since that can only be where, within the ten days allowed by law, a sufficient bond is given to prosecute the writ of error to effect, and also to answer all damages and costs. The judges of the Circuit Court were the sole and exclusive judges what security should be taken for that purpose; and they have decided that the security offered was insufficient.[1]

In respect to the other ground, that of the bankruptcy of Black, that of itself constitutes no ground why this court should interfere to stay proceedings on the execution, or to award a supersedeas. It is a matter, if at all cognisable, properly cognisable in the Circuit Court, upon an application and petition, by the assignee, to that court, upon a case showing an equitable title to relief; or for an application to the proper District Court, sitting in bankruptcy for that purpose. It is in no respect a matter within the appellate jurisdiction of this court, upon the present writ of error.

The motion is therefore overruled.

This preliminary motion having been disposed of, the cause came on, soon afterwards, for argument upon its main points.

Wilde, for Black and Chapman, the plaintiffs in error, said:

Two questions are presented by this record.

1st. Had the attaching creditor a legal cause of action at the commencement of his suit?

2d. Had there been a sufficient tradition or delivery of the effects assigned, to divest the assignor of all interest therein before attachment levied?

[1] Reviewed and Distinguished. *Jerome* v. *McCarter*, 21 Wall., 30.

The last, being decisive of the rights of the parties and merits of the case, will be first considered.

From the statement of the plaintiffs in error, the court will perceive that this is a controversy between an assignee *496] under an assignment *made for the equal benefit of all the creditors, and an attaching creditor who seeks to obtain priority of payment by legal diligence.

The assignment was made in South Carolina. The assignor and assignee are resident citizens of that state. The subject of assignment is an interest in the stocks of certain banks incorporated by the state of Louisiana. The attaching creditor is a domiciled merchant of New Orleans, where the attachment issued. He had express notice of the assignment before issuing his attachment. Indeed, he issued it in consequence of receiving that notice. The assignment was made on the 28th of April, 1841. The attachment levied on the 4th of May.

The evidence of Pettigru, and the letters of F. C. Black, and Zacharie & Co., show the notice.

At the date of the assignment, the scrip or certificates of property in the stocks referred to were in the hands of third persons, to whom they had been pledged. Their delivery to the assignee was therefore impossible. Before the attachment, application was made by the pledgee to obtain a transfer. It was refused, on the ground of some informality in the power of attorney, though the cashier of the Gas Light and Banking Company, so refusing, admits it might have satisfied persons less rigid than himself, and before a transfer could be effected, the attachment was levied.

It is obvious, at the first glance, that in any other state than Louisiana the question thus presented would not bear a moment's argument. Personal property, having no locality, but adhering to the person of the owner, passes according to the law of his domicil; and when it is shown that the assignment by the law of South Carolina would transfer the interest of Black in the stocks assigned, simply by the execution and delivery of the deed, all doubt is at an end. See the evidence of Pettigru, McCrady, and Bailey, as to the effect of this assignment, according to the laws of Carolina.

Even assignments preferring some creditors to others have been repeatedly held good. *Brooks* v. *Marbury*, 11 Wheat., 78, 98; *Tomkins* v. *Wheeler*, 16 Pet., 106, and the cases there cited. Such preferences are not fraudulent unless under a bankrupt law. *Conard* v. *Nicoll*, 4 Pet., 297.

With respect to the general principle the authorities are superabundant. Story's Conflict of Laws, 312, 315, 317, 330,

332; Angell on Assignments, 57; *Milne* v. *Moreton*, 6 Binn. (Pa.), 361; *Hunter* v. *Potts*, 4 T. R., 192; *Lewis* v. *Wallis*, 7 Jones, 223; *Sill* v. *Worswick*, 1 H. Bl., 691; *West* v. *Tupper*, 1 Bail. (S. C.), 193; *Greene* v. *Monsey*, 2 Id., 163; *Robinson* v. *Rapelye*, 2 Stew. (Ala.), 86; *Holmes* v. *Remsen*, 4 Johns. (N. Y.) Ch., 460; *Means* v. *Hapgood*, 19 Pick. (Mass.), 105; *Meeker et al.* v. *Wilson*, 1 Gall., 419.

His honor, the district judge, seems, indeed, to admit the general law as we state it, by saying in his charge that "the laws of Louisiana alone, and not the law of South Carolina, or the general commercial *law of the United States, [*497 were to be regarded in the decision of this suit; and that, according to the law of Louisiana, the delivery of the stocks was not complete, unless the transfer was entered on the books of the bank."

The rule thus broadly laid down we humbly contend is erroneous, and we shall attempt to show—

First, that the law of South Carolina, where the contract was made, is to be regarded. Next, that the delivery of the effects assigned was complete, even according to the law of Louisiana.

That the *lex loci contractus* is adopted as the rule of decision by the courts of most civilized nations is incontrovertible. Story's Conflict of Laws, *Bank U. S.* v. *Donally*, 8 Pet., 372. The charge of his honor, the district judge, however, evidently proceeds upon the assumption either that it is not the rule of the courts of Louisiana, or at least is so only under such restrictions and qualifications as render it inapplicable to a case like the present.

At a very early period in the history of those courts, we find them laying down the law thus: "The nature, validity, and effects of this contract, must be inquired into according to the laws of the country in which it was celebrated, even when the delivery of the thing, or the fact stipulated for, is to take place abroad." *Lynch* v. *Postlethwaite*, 7 Mart. (La.), 69, citing 1 Gall., 375.

Ten years later, the Supreme Court, after carefully reconsidering their opinion, reaffirm it, in a decision justly characterized as most learned and masterly. "Upon the whole," say they, "we must conclude, as we did in *Morris* v. *Eves*, and *Vidal* v. *Thompson*, that contracts are governed by the law of the country in which they were made, in everything which relates to the mode of construing them, the meaning to be attached to the expressions by which the parties bound themselves, and the nature and validity of the engagement." *Depau* v. *Humphreys*, 8 Mart. (La.), N. S., 1. And accord-

ingly they determine, "that in a note executed here, on a loan of money made here, the creditor may stipulate for the legal rate of conventional interest authorized by our law, although such a rate be disallowed in the place at which payment is to be made."—Id. *Vide Morris* v. *Ewes*, 11 Mart., (La.), 730; *Shiff* v. *Louisiana State Insurance Co.*, 6 Mart. (La.), N. S., 629; *Brown* v. *Richardson*, 1 Id., 202; *Orry* v. *Winter*, 4 Id., 277.

In *Thatcher* v. *Walden*, 5 Mart. (La.) N. S., 495, 3 Cond., 633, the court held that a verbal power of attorney, if given in a state where slaves pass by parol, is legal proof of the authority under which a written sale was made in this state. In delivering this decision, they employ the strongest language:

"There is no difference," say they, "between the right of a stranger to have the aid of the laws of the country where his debtor resides, to compel him to do justice in relation to a contract made under another government, and that of one
*498] citizen of a state to enforce *his claim against another. This principle, which is founded on the comity of nations, and makes a part of international law, would be a mere illusion, if other evidence was required for the validity of the agreement, than that of the laws of the country where it was made."

The same doctrine has since been repeatedly affirmed, liable only to the limitations given to it in the case of *Saul* v. *his creditors*, 5 Mart. (La.), N. S., 569, which will be considered hereafter. *Vide Miles* v. *Oden et al.*, 8 Id., 214; *Chartres* v. *Cairnes et al.*, 4 Id., 1; *Bell* v. *James*, 6 Id., 74; *King* v. *Herman's heirs*, 6 La., 616; *Andrews* v. *his creditors*, 11 Id., 476; *Ohio Insurance Co.* v. *Edmondson et al.*, 5 Id., 299.

It will scarcely be denied, indeed, that the *lex loci contractus* is adopted by the courts of Louisiana as their rule of decision, although it may be contended that this adoption is subject to such restrictions and qualifications as deprive the intervenor of all benefit from it, in a case like the present.

These restrictions are supposed to have been defined and established in a number of cases, some of them turning on the question of delivery.

(Mr. *Wilde* then examined with great minuteness the Louisiana decisions.)

In considering this branch of our subject, it will be remarked by the court, that we have thus far confined our citations to the decisions of Louisiana only.

We have studiously abstained from all others, because, as we alleged in the outset, except as to Louisiana, this cannot be considered an open question; and the court are so well

aware of the English and American authorities on the subject, that it would be a waste of time to quote them.

Nothing but the deference which this court habitually and uniformly exhibits for the adjudications of the local tribunals, in its anxiety to administer justice between citizens of different states, precisely as it is administered between citizens of the same state, could have induced us to restrain our argument within such narrow boundaries.

We think it is apparent, from the local decisions, that we are protected by the private law of nations, even as adopted in its most limited sense by the courts of Louisiana.

But if we are not, surely there never was a more fit and proper occasion, nay, never a more palpable and pressing necessity, for this court to assert its own unquestionable right of judgment, in opposition, if it must be so, to the state tribunals.

The question is one of international law; of the greatest practical consequence to us, as part of the family of nations, and of infinitely more importance, considering our country as a confederacy of states. It is one regarding the application of the *lex loci contractus*, on which *all Europe and [*499
America have spoken with one common voice; and
Louisiana, if indeed her decisions are adverse, is the only recusant.

How far those decisions, supposing them to trench upon received principles, are satisfactory to the common sense and justice of mankind, may be readily ascertained by a cursory reference to the treatises of learned and accomplished jurists.

The only respectable authority opposed to the doctrines we have advocated, is the case of *Ingraham* v. *Geyer*, 13 Mass., 146, 148, much relied on by our adversaries in the court below.

That case, however, was never generally satisfactory to the profession, has often been questioned, and was finally overruled by the recent case of *Means* v. *Hapgood*, 19 Pick. (Mass.), 105. In the latter case it was decided, that where a citizen of Maine executed an assignment in that state, to certain of his creditors, of a debt due to him from a citizen of that commonwealth, and the creditors having claims to an amount exceeding such debt, became parties to the assignment, it was held that the assignment was valid against a subsequent attachment of the debt here, by a citizen of Massachusetts, notwithstanding the courts of Maine had decided that a similar assignment made in this commonwealth was invalid against a subsequent attachment of the assigned property in Maine, by a citizen of that state.

It may be that we deceive ourselves as to the force of these arguments. It may be that they are unsound.

We turn then to the second point, and shall endeavor to maintain that, even according to the municipal law of Louisiana, there had been a sufficient tradition or delivery of the stocks assigned, to divest the assignor of all interest therein, before the attachment of Zacharie & Co. was levied.

It is cheerfully admitted, at the outset, that, in relation to movables, things personal and tangible, the maxim *traditionibus non pactis* has been adopted by the courts of Louisiana, and adhered to in a variety of cases in its full extent and rigor. *Durnford* v. *Syndics of Brooks*, 8 Mart. (La.), 222; *Norris* v. *Mumford*, 4 Id., 20; *Ramsey* v. *Stevenson*, 5 Id., 28; La. Code, art. 1917.

If the property assigned and attached in this case had been goods and chattels, movables, capable of actual manual possession and delivery, assuredly we should not venture to argue that, according to the municipal law of Louisiana, tradition was not necessary. That point has been settled by too long a series of judicial decisions to be now contested. But the effects conveyed by this assignment are altogether of a different nature. They are mere incorporeal rights, invisible, intangible, unsubstantial, and incapable, from their very nature, of any other than a symbolical delivery.

This distinction is recognized by several articles of the Louisiana Code. Thus:

*500] Art. 462. Incorporeal things, consisting only in a right, are not *of themselves strictly susceptible of the quality of movables or immovables: nevertheless, they are placed in one or other of these classes, according to the object to which they relate, and the rules hereinbefore established.

Art. 3395. Possession applies properly only to corporeal things, movable or immovable. The possession of incorporeal rights, such as servitudes and other rights of that nature, is only *quasi* possession, and is exercised by the species of possession of which these rights are susceptible.

Art. 2612. In the transfer of debts, rights, or claims, to a third person, the delivery takes place between the transferer and the transferee by the giving of the title.

Art. 2613. The transferee is only possessed as it regards third persons, after notice has been given to the debtor of the transfer having taken place.

Art. 2457. The tradition of incorporeal rights is to be made by the delivery of the titles, and of the act of transfer, or by the use made by the purchaser with the consent of the seller.

Art. 466 expressly classes bank shares as movables. They are, therefore, incorporeal things, movable. *Vide*, also, art. 467.

We contend, then, that these articles of the code allow the symbolical delivery of incorporeal rights, giving to it the same validity that attaches to the actual manual tradition of things tangible. Indeed, if this were not so, it would seem to follow, that incorporeal rights were insusceptible of any delivery at all.

In the execution of our task, it will be requisite to consider a number of judicial decisions, touching the subject of tradition, and, by a brief but critical examination of each, we hope to show that, in relation to incorporeal rights, nothing more has been required to vest them in the assignee than what the assignee in the present case has fully performed.

The earliest case decided is that of *Durnford* v. *Brooks's Syndics*, 3 Mart. (La.), 222, 269, 1 Cond., 112.

(Mr. *Wilde* then examined the Louisiana cases upon this point.)

The argument has hitherto been conducted according to the assumption of the district judge, that this is to be regarded as an assignment of stocks. But such assumption is surely mistaken. The stocks themselves had in both instances been already assigned as security for other debts, and the certificates at the time were actually in possession of the pledgees. The Carrollton scrip was in pledge to that bank, as security for what is technically termed a stock note, and the Gas Light Company's scrip was in pledge to the Bank of South Carolina. In both instances, therefore, nothing remained to be assigned, nothing was subject to assignment, but an equitable right in an incorporeal thing—a right to redeem the thing by paying the sum due on it—an equity of redemption in the stock, not the stock itself. This view of the subject makes it clear to us *that the district judge erred, [*501 and his error consisted in applying to a mere equity, a law regulating nothing but the actual transfer of the incorporeal thing.

If we are correct in holding that the only interest assigned, or susceptible of assignment, was an equitable right in an incorporeal thing—a right to redeem the stock by paying the sum for which it was pledged—it follows as a necessary consequence, that the subject matter of this assignment no longer belongs to the category of public stocks, transferable only in a peculiar mode, but falls into the general class of debts and credits which the common law terms choses in action, or more properly, as we contend, into that of incorporeal rights, which

pass by the delivery of the titles, and of the act of transfer. [*Vide* art. 2457 and 2612, 2613, *ante.*] With respect to the former, we have seen that no tradition or delivery is possible: none is required. Notice to the debtor stands in the place of delivery. The debt is liable to be attached so long as the debtor has not had notice of its assignment. After such notice, it is no longer subject to attachment. *Gray* v. *Trafton*, 12 Mart. (La.), 702; *Armor* v. *Cockburn et al.*, 4 Id., 667; *Bainbridge* v. *Clay*, Id., 56; *Carlin* v. *Dumatrait*, Id., 20; *Randal* v. *Moore et al.*, 9 Id., 403; *Cox* v. *White*, 2 La., 425.

But here is certainly in strictness no debt due from the bank. The corporation, to be sure, at the end of its charter, is to return the stock to its stockholders or, more properly speaking, to divide its assets, whatever they may be. But until dissolution the amount of these cannot be ascertained; and if there should be no assets there is no debt.

The only class, therefore, into which the subject-matter of this assignment can fall, is that of "incorporeal things, consisting only in a right," "the tradition of which is complete by the mere delivery of the titles, and of the act of transfer." Articles 462 and 2457, *ante*; and also art. 1918, which is as follows:

"What shall be considered a delivery of possession is determined by the rules of law applicable to the situation and nature of the property."

Now, we have seen that incorporeal things, though not strictly susceptible of the quality of movables or immovables, fall into one or the other class, according to the object to which they relate. *Vide ante*, art. 462, La. Code.

The effects here assigned belong clearly to the class of rights, claims, incorporeal things personal.

The tradition of incorporeal rights personal, is held to be complete by art. 2457, when there is a delivery of the titles and of the act of transfer. *Vide ante*, art. 2457, La. Code.

Here the delivery of the titles was complete, if that means the complete divesture of the original owner's title; if it means, as we suppose, the title papers, the scrip was in *502] the hands of third persons, *and incapable of delivery; and the right actually conveyed, not being the stock itself, but an equity of redemption in the stock, there were no other titles to be delivered but the act of transfer.

An examination of two or three cases, which are supposed to press most strongly against the plaintiffs in error, is incumbent on us.

Graves et al. v. *Roy*, 13 La., 454, 457, was decided on the ground that the assignment imposing the condition of a re-

lease, and inuring to the benefit of such creditors only as should comply with this condition, was oppressive and void, even on common law principles, as well because it did not appear to be a conveyance of all the debtor's property, as because certain claims, not alleged to be fraudulent, were excluded.

Townsend v. *The Louisiana State Marine and Fire Insurance Company*, 18 La., 551, 554, turned upon the fact that the assignment was made in Louisiana, and gave a preference to some creditors over others.

Kimball v. *Plant et al.*, 14 Id., 10, 18, was decided upon the express provisions of the Louisiana Code, that in the transfer of debts, the transferee is possessed as it regards third persons only, after notice has been given to the debtor of the transfer having taken place.

In the case of *Beirne & Barnside* v. *Patton et al.*, 17 Id., 589, 591, the court do undoubtedly lay down, broadly, that, as relates to the rights and remedies of creditors, personal property has a situs or locality, and is to be governed by the law of the country where it is situated, when there arises a conflict between the latter and the former.

The wisdom of determining only what is necessary to decide the rights of the parties, and the danger of proceeding *arguendo* to settle points neither cardinal nor fully discussed, was never more apparent than in this case, and your honors in considering it will take care to separate the judgment of the court from the dicta that accompany it.

There were at least three points on which the judgment there rendered might be placed, without at all invoking the very doubtful canon above quoted.

1st. The assignment was one giving a preference to some creditors over others.

2dly. It did not appear that it was valid, even by the laws of Tennessee, where it was made.

3dly. It distinctly appeared that the debtor reserved a part of his property.

The decision moreover seems, to some extent at least, to be based on the authority of *Ingraham* v. *Geyer*, 18 Mass., 146, since overruled by *Means* v. *Hapgood*, 19 Pick. (Mass.), 105; and is apparently in conflict with *Depon* v. *Humphreys*, 8 Mart. (La.), N. S., 1, already cited—a case of the highest authority.

If, therefore, we apply to the case at bar the rule either of **McNeil* v. *Glass*, 1 Mart. (La.), N. S., 261, before cited, or that of *Armor* v. *Cockburn*, 4 Id., 667, it will appear that Black had so completely divested himself of title as to satisfy the exigency of the first decision, and so entirely [*503

lost all power over the property as to be incapable of changing its destination, and therefore within the principle of the second. In other words, "the original owner of the property could no longer sell and deliver, so as to pass a good title." "He had lost all power over it, and could no longer change its destination;" and consequently, "the creditor could no longer seize." *Vide ante*, the quotations from the cases of *McNeil* v. *Glass*, and *Armor v. Cockburn*. *Vide* also, *Babcock* v. *Maltbie*, 7 Mart. (La.), N. S., 137; and *Urie* v. *Stevens*, 2 Rob. (La.), 253.

Nor is there any thing contrary to this in the *United States Bank* v. *Laird*, decided by this court, 2 Wheat., 393, for in that case the court recognize the possibility of acquiring an equitable title without transfer on the books of the bank—subject, of course, to any lien which the bank itself may possess.

As the distinction between equitable and legal titles does not prevail in Louisiana, where any just title is sufficient, and as no attachment can be sustained if the equitable title has passed out of the defendant in attachment before it was levied, it follows that an assignment of the equity, such as is contemplated by the court in the *United States Bank* v. *Laird*, is sufficient to defeat a subsequent attaching creditor.

Courts of common law even protect in certain cases the assignment of choses in action. *Welch* v. *Mandeville*, 1 Wheat., 233; s. c. 5 Id., 283; *Corser* v. *Craig*, 1 Wash. C. C., 424, 427.

The second point, viz.: "Had the attaching creditor a legal cause of action at the commencement of his suit?" need not detain us long.

We contend that the drawing, negotiation, and acceptance of the bills amounted to an assignment of the fund against which they were drawn. Chit. Bills, 1, 2; 3 Kent Com., 75; 2 Black., 466; *Mandeville* v. *Welsh*, 5 Wheat., 286.

Zacharie & Co. ceased to be creditors of Black from the moment of the acceptance of the bills. There remained a contingent liability to pay them, if they should be regularly protested for non-payment and due notice given; but this did not make them creditors of Black, nor even his sureties. Then, at the institution of the suit, there was no debt due by the defendant to the plaintiff. *Taylor* v. *Drane*, 13 La., 64; Pothier on Obligations, 235, and note.

An endorser who has not paid his endorsee is not a creditor. *Planters' Bank* v. *Lanusse*, 10 Mart. (La.), 690.

Credit given in an account current for a note extinguishes the account and produces a novation. *Cox* v. *Williams*, 7 Mart.

(La.), N. S., 301; *Barron* v. *Horr*, 2 Id., 144; *Gordon et al.* v. *McCarty*, 9 Mart. (La.), 288.

*Here the bills were credited in the account. [*504

The mode of ascertaining whether there was any existing debt at the time of attachment is to inquire whether, considering it a case of bankruptcy, Zacharie & Co. could have proved against the bankrupt's estate, before payment of the bills.

There cannot be two creditors for the same debt, entitled both to prove at the same time.

Now, the holder of the bills would clearly have been entitled to prove; and, consequently, Zacharie & Co. would not.

Their debt revived when they paid the amount of the bills, not before.

These principles have become proverbial: "*Qui a terme ne doit rien.*" Loysel, Evans's Pothier on Obligations. "*Quod in diem stipulamur, peti prius quam dies venerit non potest.*" Justin. Inst., by Cooper, p. 249.

If, by any interpretation, Zacharie & Co. can be considered creditors at the time of commencing their action, this debt was not due, and their suit was premature. La. Code, art. 2047; Code of Pr., art. 158; *Groning* v. *Krumbhaur*, 13 La., 64; *Atwell* v. *Belden*, 1 Id., 504; *Williamson* v. *Foucher*, 8 Id., 585.

Coxe, for the defendants in error, recapitulated the facts in the case, and then said—

The questions presented by the record are:

1. Whether, on the 4th May, 1841, any debt was in fact due by Black to plaintiffs.

2. Whether the deed of assignment, *per se*, operated a transfer of the stock.

3. Whether, if such debt actually existed on which suit could be sustained, the attachment laid on the 4th May, or the assignment of 28th April is to prevail.

1. Whether, on the 4th May, 1841, Black was indebted to plaintiffs.

By the account sales of sugar and molasses, it appears that such sales were made of a cargo, consigned by Zacharie & Co. (to Black,) net proceeds subject to their order for account of whom it may concern.

This account rendered by Black on the 12th April, 1841, shows a balance due plaintiffs of $9366.68.

The account shows that the proceeds were the property of plaintiffs; the average time of payment 27th to 30th April;

and, consequently, the notes given by purchasers were the property of plaintiffs held by Black as their agent.

In this position of affairs, plaintiffs drew several bills on Black, in February, March, and April, and what became of *505] them is shown by the record. None of these bills appear on their face to have been *accepted by Black; but, in the protests of some, three of the five, he is called the acceptor. All were returned under protest for non-payment, and taken up by plaintiffs after the institution of the suit.

It is insisted that the drawing of these bills operated a transfer of the debt, and as between these parties, extinguished the original liability.

The drawing of bills by a consignor and his consignee, is a matter of daily occurrence in the immense business of New Orleans; advances are thus made by the purchasers of such bills, and they are of infinite convenience. To regard them as operating an extinguishment of the debt of the consignee, before payment, is a novel doctrine, replete with the most serious consequences.

This extinguishment of the old debt by the substitution of a new one, is called, in the Louisiana law, a novation.

Wherever this doctrine of novation exists, under whatever name, the application of it depends upon the intention of the parties as exhibited in their acts. Nap. Code Civil, lib. iii., tit. iii., sect. 2, § 1273. It is never to be presumed—it is essential that the intention to operate it result clearly from the act. *Peter* v. *Beverley*, 10 Pet., 568.

It is a settled doctrine that the acceptance of a negotiable note for an antecedent debt will not extinguish such debt, unless it is expressly agreed that it is received as payment. The evidence must be clear and satisfactory that such was the intention of the parties.

This is a much stronger case than the acceptance of a negotiable note; the drawer of the bill does not disconnect himself from the debtor. His responsibility remains to the holder. See the three cases of novation, Nap. Code, N. S.

The acts of the parties show that they had no such intention.

1st. Plaintiffs do not assign their claim for a valuable consideration and exonerate themselves from it.

So far from such a bill dissolving the connection between the parties, it presumes its existence and continuance. If drawee refuses to accept, drawer may sue and recover for such act. If he refuses to pay, he has a full remedy growing out of the original indebtment.

2d. Black never so regarded or treated it.

1. In his account dated 12th April, 1841, no entry is made of these bills and acceptances; no credit claimed; but the balance growing out of the sale of sugars, &c., distinctly stated and admitted.

2. In his schedule of creditors, annexed to the assignment to Chapman, Zacharie is put down as one, and McDonald, the payee and holder of bills, is not.

3. His letter of 28th April so treats plaintiff, and particularly mentions the drafts about to fall due.

4. Black's books, as proved by Pettigru, show the same thing.

*Throughout, such appears to be the understanding of the parties. Such, then, being the mercantile usage, such the particular understanding of these parties, what does the law say? Civil Code, art. 2181. [*506

Novation is a contract, consisting of two stipulations, one to extinguish an existing obligation, the other to substitute a new one in its place. Pothier on Oblig., 341, (550,) 344, (559,) Civil Code, art. 2183, 2185, 2190. The mere indication by the creditor of a person who is to receive for him does not operate a novation. Pothier, Traite de Vente, No. 600, 608. Touiller, Le Droit Civil, (5me. edit.) vol. 7, lib. iii. tit. iii. c. 5, p. 243, 4. Ibid., 66, No. 46. 19 Sircy Recueil General, 55, 56, 57.

In Louisiana the law is well settled by adjudications. *Cox* v. *Rabaud's Syndic*, 4 Mart. (La.), 11; *Hobson* v. *Davidson's Syndic*, 8 Id., 428; *Gordon* v. *McCarty*, 9 Id., 268; *Bonnmere* v. *Negretti*, 16 La., 474; *Plique* v. *Perret*, 19 Id., 318.

2. Does the assignment operate, *per se*, as transfer of the stock.

1st. The assignment, &c., does not act, *per se*, as a transfer of stock in Louisiana banks.

2d. Black executes two powers of attorney, one 15th April, 1841, to transfer to the Bank of South Carolina; the other—April, acknowledged on 30th.

3d. These powers indicate no person by name, but merely give the power to "the cashier, &c." This is invalid of itself.

The charters of the Louisiana banks are not imbodied in the record, but the substance of them is imbodied in the instructions prayed.

If such instruction was not warranted by the evidence, it was rightly refused. The modern charters of banks have copied substantially the provisions on this subject, in that of the Bank of England. An abstract of that charter may be found, 3 Petersd. Abr., 276, 285, 286, Amer. edit.; *Bank of*

the United States, 3 Story Laws U. S., 1547, 1552; *Rex* v. *Bank of England*, Doug., 523.

It clearly appears that the transfer on the books is necessary to pass title. 2 Bing., 393; 3 Petersd. Abr., 268, (410.)

It is incumbent on banks not to permit a transfer until satisfied of authority to transfer. If they err, they are bound to make good the loss. *Sutton* v. *Bank of England*, 1 Car. & P., 193; s. c. 1 Ry. & M., 52.

Action will lie against the bank for unreasonable delay in permitting transfer. *Hartga* v. *Bank of England*, 3 Ves., 55; *Bank of England* v. *Parsons*, 5 Id., 665. See this last case particularly.

If this stock stood upon the common footing of other personal property, in the hands of third persons, it would not pass until he was notified. Here no notice was given until the 5th May; the attachment had been laid on the 4th.

*507] *The power of attorney to transfer mentions no party by name. They designate "the cashier, &c." This is a void authority.

3. The attachment issued and levied on the 4th May, 1841, takes precedence of the assignment.

The question is one of deep interest to the commercial part of Louisiana, and settled by her courts.

Whatever may be the general commercial law, Louisiana has her own law.

In this case the question is between an attaching creditor and a voluntary assignee. An attaching creditor is a purchaser for a valuable consideration. *Langran* v. *Simmons*, 17 Mass., 110.

It is then a case of a purchaser of such a character, with all the equity, now possessed of legal title.

The legal title does not pass without a transfer on the books of the corporation. 22 Wend. (N. Y.); 2 Wheat.

It is said this point would not admit of argument out of Louisiana. There seems a singular misapprehension on this point.

By the common law, delivery is a general essential to the passing of title to personal property. Statutes of Elizabeth, 1 Gall., 428; 17 Mass., 110.

Here the Louisiana property is to be carried to a foreign state for distribution, and Louisiana creditors to follow it there. This is against the policy of the state, and required by no comity.

In regard to intestates. Confl. of Laws, 523.

The law in regard to stocks is peculiar. Confl. of Laws, 383, note. Emphatically the law of Louisiana and of France.

Pothier, Traite de Vente, 186, part 5, art. 2, sect. 318, &c.; 5 Mart. (La.), 43, 75, 57; 4 Id., 20; 2 La., 422; 14 Id., 10; 12 Id., 395; Story, Confl. of Laws, 386—390.

Wilde, in reply, examined, in the first place, whether there was an existing debt due from Black, at the time of laying the attachment. If the proof of such a debt did not rest upon the bills of exchange, because (as had been argued by Mr. *Coxe*) they were not accepted, then we must look elsewhere for it, because merely drawing upon a person does not make him a debtor. The proof of an existing debt can only be discovered (leaving out the bills) in—1. The account sales. 2. The letter of Black. 3. The evidence of Pettigru.

(Each head of which was separately examined by Mr. *Wilde*.)

If, on the other hand, the bills were accepted, then there was a novation of the debt, and not a mere delegation.

Zacharie & Co. had notice of the assignment, as appears from Black's letter to them. The Gas Light Bank had notice also of the claim of the Bank of South Carolina; and the Carrollton Bank could not be injured by the want of notice, because they held the scrip in pledge.

The whole object of notice is to prevent injury to the debtor, *holder of the property, or depositary; to [*508 prevent an innocent person from two recoveries against him for the same cause.

But here the one bank had express notice from the pledgee, (Bank of South Carolina.) The other held the scrip in pledge for its own debt. Neither could be prejudiced.

So far as the reason of the case goes, the maxim applies, "*cessante ratione, cessat et ipsa lex.*"

It was distinctly admitted at the outset, that by the law of Louisiana, absolute tradition of personal property was necessary to protect it from attachment.

It was equally admitted that, as to debts assigned, they remained liable to attachment, until notice of the assignment had been given to the debtor. After such notice, they cannot be attached.

But it was contended, and is still insisted, that the equity of redemption in certain stocks in pledge is neither a personal thing, tangible and susceptible of tradition or delivery, nor is it a debt which requires notice to be given to the debtor. It belongs to the category of incorporeal things movable.

The learned counsel errs, in supposing the articles of the Code, quoted in the opening, refer to what are called, by the common law, incorporeal hereditaments.

On the contrary, incorporeal things, by the Louisiana law, are classed into movable and immovable. Art. 462, L. C.

And article 466 expressly declares bank stocks to be movables.

The equity of redemption assigned in this case, then, is neither a thing movable, susceptible of manual tradition, nor is it a debt, which, in order to perfect the assignee's title, requires notice to be given to the debtor.

There is no article of the Code, no decision of the courts of Louisiana, which requires manual tradition, which is impossible, or notice to the bank, which is unnecessary, as the bank is not a debtor.

But the court are asked to extend the principle by analogy.

There is no room for such analogy.

On the contrary, the analogy and the reason of the thing are the other way.

Art. 3395, Louisiana Code, says possession applies properly only to corporeal things movable or immovable.

Art. 2612, as to debts, makes notice equivalent to tradition; but

Art. 2457 declares that the tradition of incorporeal rights is to be made by the delivery of the titles, and of the act of transfer.

No distinction is made between incorporeal rights to things movable and things immovable. All incorporeal rights may be so transferred. See *Martinez* v. *Perez*, 8 Mart. (La.) N. S., 668.

Here every thing was done that could be done. The scrip was in the hands of the pledgees. That could not be delivered to the assignee, because the assignee had neither possession of it nor control over it.

*509] *Immediate notice was given to the creditor, Zacharie & Co., and in consequence of that notice he issued the attachment.

Notice was given to the banks as early as possible, and the Gas Bank had notice of the lien of the Bank of South Carolina before the attachment issued.

Neither the Louisiana Code nor the decisions of the courts sustain the attempt to declare this assignment void, for want of delivery of the effects assigned.

Nor is it supposed the judge rested his charge on the public or general law.

The argument of the learned counsel certainly reposes mainly on the clauses of the charters.

(Mr. *Wilde* here referred to the charters, and cited the following cases: *Bank of Utica* v. *Smalley & Barnard*, 2 Cow.

(N. Y.), 777, 778; *Sergeant* v. *Franklin*, 8 Pick. (Mass.), 96, 97; *Gilbert* v. *Manchester Iron Co.*, 11 Wend. (N. Y.), 628; *Commercial Bank* v. *Kortwright*, 22 Id., 362.)

The case of the *United States Bank* v. *Laird*, 2 Wheat., 393, shows that the court recognize the possibility of acquiring an equitable title, without a transfer on the books of the bank.

Mr. Justice STORY delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the eastern district of Louisiana. The original suit was brought in the state court, against Black alone, upon an attachment issued by Zacharie & Company against him, he being a citizen of South Carolina, and not resident in Louisiana; and upon this attachment certain shares of Black, in the Carrollton Bank, and the Gas Light and Banking Company, in Louisiana, were attached, to answer the exigency of the writ. Black appeared in the suit, and caused it to be removed into the Circuit Court. Black, upon his appearance, pleaded that prior to the attachment he had assigned the attached stock to James Chapman, of South Carolina, by a trust-deed, for the benefit of all his creditors. After the removal of the suit into the Circuit Court, Chapman filed an intervention, according to the Louisiana practice, and became a party to the suit to protect his interest under the trust-deed. In his petition of intervention he asserted his title, and that he had given due notice thereof to the Carrollton Bank, and the Gas Light and Banking Company; and that Zacharie & Co. had due notice thereof before their attachment.

The cause was tried by a jury upon the pleadings in the case; and upon the trial it was proved that the assignment was made by the trust-deed in South Carolina, by Black to Chapman, on the 28th of April, 1841. The attachment of Zacharie & Co. was made on the 4th of May, 1841, with a full knowledge of the assignment. Long before the attachment, the stock in the Carrollton Bank had been transferred and pledged to the Carrollton Bank, for a stock loan, and was then held by that bank, under that transfer, the equity of redeeming *the same only remaining in Black. On the [*510
15th of April, 1841, Black had executed a letter of attorney to the cashier of the Gas Light and Banking Company, to transfer the same to the Bank of South Carolina, of which notice was sent on the next day to the Gas Light and Banking Company, and notice was received by the latter on the 22d of April; but owing to some informality in the letter of attorney, the transfer was not then made, but the paper was sent back

to be corrected, the company then agreeing to transfer it when the informality was corrected. The Bank of South Carolina was a holder of the stock, under this power, for value; and of this transaction also Zacharie & Co. had notice before their attachment.

At the trial, the jury found a verdict for the original plaintiffs, and judgment thereupon passed for them. Two bills of exceptions were taken to the ruling of the court at the trial, and upon these exceptions the cause has been brought before this court.

It does not seem necessary to recite at large the matters contained in these exceptions. They give rise to two questions, which have been fully argued at the bar, although very inartificially presented in the record: First, whether at the time of the commencement of the suit of Zacharie & Co. there was any debt due to them, upon which the attachment could, under the circumstances, be maintained? Secondly, whether the assignment to Chapman, being made in South Carolina, and known to Zacharie & Co. at the time of their attachment, and being, by the laws of South Carolina, a good and valid assignment, is entitled to a priority over the attachment. The latter question, so far as it respected the notice to Zacharie & Co., and the equity of the assignee, is not so precisely put as it is obvious it was intended to be, in the instructions asked by the intervenor. But it is plain, from the qualifications of those instructions suggested by the court, that the court held that the delivery of the stock was not complete, and that the assignment did not pass the right to the stock to the assignee, unless the transfer was entered upon the books of the bank, notwithstanding the notice; and that the law of Louisiana upon the point was different from that of South Carolina. In this way only is the verdict at all reconcilable with the admitted state of facts.

In respect to the first question, it is plain to us that there was no debt due to Zacharie & Co., at the time when the attachment was made. The supposed debt was for the proceeds of a cargo of sugar and molasses, sold by Black on account of Zacharie & Co. Assuming those proceeds to be due and payable, Zacharie & Co. had drawn certain bills of exchange upon Black, which had been accepted by the latter, for the full amount of those proceeds; and all of these bills had been negotiated to third persons, and were then outstanding, and three of them were not yet due. It is clear, upon principles of law, that this was a suspension of all right of action in Zacharie & Co., until after those bills had become due and dishonored, and were taken up by Zacharie & Co.

*It amounted to a new credit to Black for the amount of those acceptances, during the runningof the bills, and gave Black a complete lien upon those proceeds, for his indemnity against those acceptances, until they were no longer outstanding after they had been dishonored.

Whether the transactions by the drawing and acceptance of these bills amounted to a novation of the debt, which might otherwise be due under the account current for the sales of the sugar and molasses, it is not necessary to decide; for, assuming that these transactions might be treated as a conditional novation only and not as an absolute novation, it would make no difference in the conclusion to which we should arrive under the circumstances of this case.

It is true that the statute law of Louisiana allows, in certain cases, an attachment to be maintained upon debts not yet due. But it is only under very special circumstances; and the present case does not fall within any predicament prescribed by that law. The statute does not apply to debts resting in mere contingency, whether they will ever become due to the attaching creditor or not; nor to any case except of absconding debtors; and this, therefore, is a case not governed by it. We think, then, that there was error in the ruling of the court in admitting that there was a sufficient debt established by the evidence to maintain the attachment.

The other point is one of much greater importance, although in our judgment not attended with any intrinsic difficulty. We admit, that the validity of this assignment to pass the right to Black in the stock attached depends upon the law of Louisiana and not upon that of South Carolina. From the nature of the stock of a corporation, which is created by and under the authority of a state, it is necessarily, like every other attribute of the corporation, to be governed by the local law of that state, and not by the local law of any foreign state. And in the present case, if the local law of Louisiana had prohibited (as we think it had not) any assignment of an equitable interest in the stock attached, we should not have scrupled to have followed that law. The question is not here, whether the legal interest in the stock passed by the assignment before a transfer of the stock upon the books of the corporations; but whether the equitable interest therein, as contradistinguished from the legal interest, did not pass to and vest in the assignee by the law of Louisiana, so as to oust the right of any creditor with full notice of the assignment from divesting the title of the assignee by a subsequent attachment thereof as the property of the debtor. In respect to the Carrollton Bank it is clear that nothing but an equit-

able interest could be conveyed or was intended to be conveyed by the assignment; for the bank already held the legal title as a pledge for a stock loan. In respect to the Gas Light and Banking Company, the interest in the stock had been transferred to the Bank of South Carolina as a pledge, and the letter of attorney was given to perfect the equitable *512] *title into a legal title by an actual transfer on the books of the corporation. But, subject to that pledge, the equity was with the consent of the Bank of South Carolina vested in the assignee under the assignment. So that each case presented the same general question as to the validity of the equitable title by the law of Louisiana against attaching creditors, having full knowledge of that equity. Out of Louisiana, we believe that no such question could possibly arise; for courts of law, as well as courts of equity, are constantly, in all states where the common law prevails, in the habit of holding a prior assignment of the equitable interest in stock as superseding the rights of attaching creditors, who attach the same with a full knowledge of the assignment.

Upon full examination of the laws of Louisiana and the decisions of its courts, we see no reason to believe that a different doctrine on this subject prevails in that state. It is true that the same distinctions between legal and equitable rights may not as to the mode of remedy exist in that state, which are recognized in states governed by the common law; but the same purposes of substantial justice are attained there under similar circumstances as the courts in other states are accustomed to administer in a different form.

There is a marked distinction in the Louisiana law between the transfer of corporeal things movable, and things incorporeal. In the former a manual tradition of the thing is ordinarily but not universally required to perfect the title. In the case of incorporeal things no such tradition can take place, and therefore such a delivery as the thing admits of—a sort of symbolical delivery—is admitted by the law as a substitute. There are several articles of the Civil Code of Louisiana bearing directly on this point; but it will be sufficient only to cite a few of those which have been relied on by counsel. Art. 2612 declares, "In the transfer of debts, rights, or claims, to a third person, the delivery takes place between the transferrer and transferree by the giving of the title." Art. 2613 declares, "The transferree is only possessed, as it regards third persons, after notice has been given to the debtor of the transfer having taken place." Art. 2456 declares, "The tradition of the incorporeal rights is to be

made either by the delivery of the titles and of the act of transfer, or by the use made by the purchaser with the consent of the seller." In *Bainbridge* v. *Clay*, 16 Mart. (La.), 56, the Supreme Court of Louisiana said, "A debt due [by] the defendant on a *fieri facias* cannot as to third persons completely pass to the assignee unless there be what in sales of tangible property is called a tradition or delivery; and this is effected as to choses in action by notice of the assignment to the debtor." Again, in *Babcock* v. *Maltbie*, 19 Mart. (La.), 137, the same learned court said that the true test, in cases of assignment, is, "That where the owner of the property has lost all power over it and cannot change its destination, the creditors cannot attach." The same doctrine was directly affirmed in the recent case of *Urie* v. *Stevens*, 2 Rob. (La.), 251. The principles announced in these decisions seem completely to cover the present suit. In the case of the Carrollton Bank the shares had actually passed to the bank itself as a pledge, and nothing but an equity remained in Black, capable of being transferred, and that was assigned by the deed of assignment to the assignee before the attachment, and was known to Zacharie & Co. at the time when they made their attachment; and at least as early as the next day it was made known to the bank. So that the creditors had full notice and the bank had full notice; and the creditors could not make a valid attachment when to their knowledge the property no longer belonged to their debtor. The case as to the Carrollton Bank falls, then, directly within the principles just stated. The owner had parted with all his property in the stock; he had lost all power over it; and he could not change its destination. The same principles apply, *à fortiori*, to the Gas Light and Banking Company; for there, not only had the creditors notice of the assignment before their attachment, but the company also had notice thereof before that period. [*518

It is true that the charters of the Carrollton Bank and of the Gas Light and Banking Company provide that no transfer of the stock of these corporations shall be valid or effectual until such transfers shall be entered or registered in a book or books to be kept for that purpose by the corporation. But this is manifestly a regulation designed for the security of the bank itself, and of third persons taking transfers of the stock without notice of any prior equitable transfer. It relates to the transfer of the legal title, and not of any equitable interest in the stock subordinate to that title. In the case of the *Union Bank of Georgetown* v. *Laird*, 2 Wheat., 390, this court took notice of the distinction between the legal and equitable

title in cases of bank-stock, where the charter of the bank had provided for the mode of transfer. The general construction which has been put upon the charters of other banks containing similar provisions as to the transfer of their stock, is, that the provisions are designed solely for the safety and security of the bank itself, and of purchasers without notice; and that as between vendor and vendee a transfer, not in conformity to such provisions, is good to pass the equitable title and divest the vendor of all interest in the stock. Such are the decisions in the cases of the *Bank of Utica* v. *Smalley*, 2 Cow. (N. Y.), 777, 778; *Gilbert* v. *Manchester Iron Co.*, 11 Wend. (N. Y.), 628; *Commercial Bank of Buffalo* v. *Kortwright*, 22 Id., 362; *Quiner* v. *The Marblehead Insurance Co.*, 10 Mass., 476; and *Sergeant* v. *Franklin Insurance Co.*, 8 Pick. (Mass.), 90.

We see no reason to doubt that the jurisprudence of Louisiana adopts a similar interpretation for the purpose of protecting equitable title against the claims of creditors of the transferrer, who have notice of such equitable titles. If it *514] will protect an assignment of *a chose in action against attaching creditors after notice of the assignment given to the debtor, because no title remains in the transferrer, (as we have seen it will,) *à fortiori*, it ought to protect it where the attaching creditor himself has notice, since, in justice, he is entitled only to take under his attachment what rightfully remains in the transferrer. In the absence of any positive controlling statute or direct adjudication of the courts of Louisiana upon the very point, in contradiction to the doctrine maintained in other states, as one founded *ex æquo et bono* in general justice, we may well presume, that a state deriving its jurisprudence from the Roman Law, has not failed to act upon it.

There is another ground, auxiliary to this last view, which is entitled to great consideration. It is well settled as a doctrine of international jurisprudence, that personal property has no locality, and that the law of the owner's domicil is to determine the validity of the transfer or alienation thereof, unless there is some positive or customary law of the country where it is found to the contrary. This doctrine has, in the very late case of the *United States* v. *The United States Bank*, (in June, 1844,) been fully and directly recognized and affirmed by the Supreme Court of Louisiana, as a part of its own international jurisprudence; and it was applied in that very case to support an assignment made in Pennsylvania, by the Bank of the United States, to certain assignees, who were intervenors of goods, debts, credits and effects in Louisiana. The court held that the assignment, being proved to be valid

and effectual by the law of Pennsylvania, was to be deemed equally valid and effectual to pass the goods, debts, credits, and effects of the bank, to the assignees in Louisiana, against the attaching creditors, who had notice of the assignment at the time of their attachment. The decision turned upon the very doctrine of international jurisprudence just referred to. So that here we have the high authority of the state court in this very matter, that there is nothing in the jurisprudence of Louisiana, which forbids giving full effect and validity to an assignment of debts, credits and equities, situate in that state, where the assignment is valid and effectual by the law of the state where it is made, so as to oust the rights of attaching creditors who have due notice thereof. Now, in the case before us, there is plenary evidence that the assignment was valid and effectual by the laws of South Carolina, when and where it was made, to pass the right to the property in controversy; and that the attaching creditors had notice thereof before their attachment was made; so that its validity and effect are the same in Louisiana as in South Carolina. It is true that the legal title could not pass without a regular transfer of the stocks upon the books of the corporation; but it is equally true, that the title to the property, subject to the pledge thereof, was complete in the assignee, so as to bind the banks as well as the attaching creditors, after due notice to them respectively. We are, *therefore, of opinion, [*515
that the district judge erred in directing the jury that the delivery of the stock was not complete unless the transfer was entered upon the books of the banks. That was true as to the absolute legal title, but it did not prevent the equitable title from passing to and becoming completely vested in the assignee under and in virtue of the assignment, so as to bind the attaching creditors, as soon as they had notice thereof, and in like manner the banks, as soon as they had notice thereof.

Upon both grounds, therefore, stated in the exceptions, the judgment of the Circuit Court is reversed, and the cause remanded to that court with directions to award a *venire facias de novo*.

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JOHN B. CAMDEN, PLAINTIFF IN ERROR, *v.* THOMAS C. DOREMUS, CORNELIUS R. SUYDAM, JAMES SUYDAM, AND JOHN M. NIXON, DEFENDANTS IN ERROR.

Where a general objection is made, in the court below, to the reception of testimony, without stating the grounds of the objection, this court considers it as vague and nugatory; nor ought it to have been tolerated in the court below.[1]

Where at the time of the endorsement and transfer of a negotiable note, an agreement was made that the holder should send it for collection to the bank at which it was, on its face, made payable, and in the event of its not being paid at maturity, should use reasonable and due diligence to collect it from the drawer and prior endorsers before resorting to the last endorser, the holder is bound to conditions beyond those which are implied in the ordinary transfer and receipt of commercial instruments.[2]

Evidence of the general custom of banks to give previous notice to the payer, of the time when notes will fall due, was properly rejected, unless the witness could testify as to the practice of the particular bank at which the note was made payable.[3]

A presentment and demand of payment of the note, at maturity, within banking hours, at the bank where the note was made payable, was a sufficient compliance with the contract to send it to the bank for collection.

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[1] APPLIED. *Burton* v. *Driggs*, 20 Wall., 133; *Mays* v. *Fulton*, Id., 418. FOLLOWED. *Rosenthal* v. *Chisum*, 1 New Mex., 637. CITED. *Fischer* v. *Neil*, 6 Fed. Rep., 90; *City of Delphi* v. *Lowery*, 74 Ind., 522.

General objections to the admission of evidence are unavailable to the party making them; the particular grounds of the objections must be stated, so that the trial court may fully understand the nature of the objection before passing upon it. *United States* v. *McMasters*, 4 Wall., 680. Of course this must be done so as to be available both upon a motion for a new trial, and upon appeal. *Gharkey* v. *Halstead*, 1 Ind., 389; *Curry* v. *Bratney*, 29 Ind., 195.

[2] A collateral agreement executed at the same time the note is executed is construed with it; as an agreement in a mortgage to secure its payment, agreeing to pay interest *annually*. *Muzzy* v. *Knight*, 8 Kan., 456; *Meyer* v. *Grueber*, 19 Id., 165; or a provision in the mortgage not contained in the note. *Dobbins* v. *Parker*, 46 Iowa, 358. The agreement must be, if cotemporaneous, in writing. *Cuthbert* v. *Bowie*, 10 Ala., 163; but a subsequent agreement need not be. *Heaton* v. *Meyers*, 4 Col., 63; *Solomons* v. *Jones*, 3 Brev. (S. C.), 54; *Lorn* v. *Treadwell*, 12 Me., 441; *Allen* v. *Furbish*, 4 Gray (Mass.), 504; *Newton* v. *Jackson*, 23 Ala., 335. The agreement must be carried out to be available. *Crossman* v. *Fuller*, 17 Pick. (Mass.), 171; *Dow* v. *Tuttle*, 4 Mass., 414; *Gibbon* v. *Scott*, 2 Stark., 286.

What is due diligence depends largely upon local statutes and practice that has grown up in the courts. *Jones* v. *Ashford*, 79 N. C., 176; *McDoal* v. *Yeomans*, 8 Watts (Pa.), 361; *Sanford* v. *Allen*, 1 Cush. (Mass.), 473; *Cooke* v. *Nathan*, 16 Barb. (N. Y.), 342; *White* v. *Case*, 13 Wend. (N. Y.), 547; *Burt* v. *Horner*, 5 Barb. (N. Y.), 501.

[3] Where the custom prevails at a particular place at which a note is payable, to issue notice to the promisor a few days before maturity, informing him that the note is payable, such notice constitutes a conventional demand, and must be complied with. *Lincoln & Kennebec Bank* v. *Page*, 9 Mass., 155; *Same* v. *Hammet*, Id., 159; whether it is made payable at a particular bank, or placed there for collection. *Jones* v. *Fales*, 4 Mass., 245; *Mechanics' Bank* v. *Merchants' Bank*, 6 Metc. (Mass.), 24; *Whitewell* v. *Johnson*, 17 Mass., 449; *Grand Bank* v. *Blanchard*, 23 Pick. (Mass.), 505. See *Leevitt* v. *Sims*, 3 N. H., 14; *Marine Bank* v. *Smith*, 18 Me., 99; *Gallagher* v. *Roberts*, 11 Id., 489.

Camden v. Doremus et al.

The record of a suit brought by the holder against the maker and prior endorsers was proper evidence of reasonable and due diligence to collect the amount of the note from them; and it was a proper instruction, that if the jury believed that the prior endorsers had left the state and were insolvent, the holder of the note was not bound to send executions to the counties where these endorsers resided at the institution of the suit.

The diligent and honest prosecution of a suit to judgment with a return of *nulla bona*, has always been regarded as one of the extreme tests of due diligence.

And the ascertainment, upon correct and sufficient proofs, of entire and notorious insolvency, is recognized by the law as answering the demand of due diligence, and as dispensing with the more dilatory evidence of a suit.[4]

If the holder cannot obtain a judgment against the maker for the whole amount of the note, in consequence of the allowance of a set-off as between the maker and one of the prior endorsers, this is no bar to a full recovery against the last endorser, provided the holder has been guilty of no negligence.

*THIS case was brought up, by writ of error, from the [*516 Circuit Court of the United States for the district of Missouri.

The defendants in error were citizens of the state of New York and partners in trade under the name and style of Doremus, Suydams and Nixon. The plaintiff in error was the surviving partner of the mercantile house of John B. and Marbel Camden, which carried on business at St. Louis under the name and firm of J. B. and M. Camden. The plaintiff in error was sued in the court below as endorser of the following promissory note.

On the 8th of June, 1836, Ewing F. Calhoun executed this note, viz.:

"$4219 90.

"Twelve months after date, I promise to pay Judah Barrett, or order, four thousand two hundred and nineteen dollars and ninety cents, negotiable and payable at the Commercial Bank of Columbus, June 8, 1836.

EWING F. CALHOUN,

"Mississippi — 1809." Columbus, Mississippi."

Which note was endorsed by Barrett to Sterling Tarpley, or order, by him to J. B. and M. Camden, or order, and by them to Doremus, Suydams, and Nixon, or order.

On the 22d of August, 1836, the plaintiffs and defendant entered into the following agreement:

"*New York, August 22d*, 1836.

"Memorandum of an agreement and trade made by and

Contra, *Moore* v. *Waitt*, 13 N. H., 415; *Farmers' Bank* v. *Duvall*, 7 Gill & J. (Md.), 78, (no sufficient evidence;) *Barnes* v. *Vaughan*, 6 R. I., 259; 2 Ames on Bills and Notes, 858.

[4] CITED. *Watson* v. *Tarpley*, 18 How., 519; *Terry* v. *Tubman*, 2 Otto, 161.

between Doremus, Suydams and Nixon, of the city of New York, of the one part, and J. B. & M. Camden, of the city of St. Louis, of the other part, witnesseth: Whereas, the said Camdens have this day sold and assigned unto the said Doremus, Suydams and Nixon, a note for four thousand two hundred and nineteen $\frac{80}{100}$ dollars, payable twelve months after date, and dated the eighth day of June, 1836, and negotiable and payable at the Commercial Bank of Columbus, Miss., executed by Ewing F. Calhoun to Judah Barrett, and endorsed by the said Judah Barrett and Sterling Tarpley and J. B. & M. Camden: Now, it is expressly understood and agreed by the contracting parties, that the said Doremus, Suydams and Nixon, are to send the said note to the said Commercial Bank of Columbus, Mississippi, for collection, and in the event of its not being paid at maturity, they are to use reasonable and due diligence to collect it of the drawer and two endorsers before they call upon the said Camdens; but in the event of its not being made out of them, then the said Camdens bind and obligate themselves, so soon as informed of the fact, to pay the said Doremus, Suydams and Nixon, the principal of the said note, together with its interest and all legal costs they may have incurred in attempting its collection.

J. B. & M. CAMDEN,
DOREMUS, SUYDAMS & NIXON."

*517] *The note not being paid at maturity, suit was brought by the endorsers against the plaintiff in error as surviving partner of the endorsers J. B. & M. Camden.

Upon the trial of the cause, the plaintiff offered to read in evidence sundry depositions, and also a voluminous record, which are all set forth in full in the first bill of exceptions, but which it is impossible to insert here on account of their great length. They were,

1. The deposition of Thomas B. Winston, that he presented the note at the Commercial Bank of Columbus, and demanded payment thereof, which was refused; that payment was demanded on the 10th of June, 1837, because the day of payment fell on Sunday; that it was protested, and notices thereof sent to the first, second, and third endorsers.

2. The deposition of Ewing F. Calhoun, proving his own signature; the handwriting of the first and second endorsers; that he was sued at the first court after the note became due; that the suit was prosecuted as diligently as possible to a judgment and execution; that deponent continued to reside in Lowndes county, Mississippi, but that at the rendition of the judgment Barrett resided in South Carolina, and Tarpley in

Texas; that Barrett and Tarpley were both insolvent, and had no property within the state of Mississippi, out of which to make the judgment, or any part thereof; that at the trial deponent was allowed a set-off against Tarpley, of about $1500, which Tarpley owed deponent at the time of the commencement of the suit, and before he received notice of Tarpley's endorsement.

3. The deposition of Samuel F. Butterworth, that the suit was prosecuted as diligently as possible to judgment and execution; that at October term, 1838, a verdict was rendered for the plaintiffs, which was set aside; that in April, 1839, another verdict was rendered, which was also set aside; that in December, 1839, a verdict was rendered for only $3498.46, upon which a *fieri facias* was issued, the statutes of the state not authorizing process against the person; that no property could be found out of which the execution or any part thereof could be made.

4. A document purporting to be a transcript of the record of the suit spoken of above, showing its progress up to the final return of the sheriff, which was as follows: "The within named Ewing F. Calhoun, Judah Barrett, and Sterling O. Tarpley, have no goods or chattels, lands or tenements, within my county, whereof I can make the sums within mentioned, or any part thereof. March 28th, 1842."

Each one of these papers was severally objected to by the defendant, but the court overruled the objection, and permitted them to be read in evidence. The admission of these four papers constituted the ground of the first bill of exceptions.

Bill of exceptions No. 2.

*"Be it remembered, that on the trial of this cause, [*518 the plaintiffs, in addition to the evidence in the former bill of exceptions in this case contained, examined Pardon D. Tiffany as a witness, who testified, that shortly before this suit was brought, as well as after, he had conversations with the defendant in relation to the claim of the plaintiffs against him; and the defendant told the witness that he had transferred the note in question in the present action to the plaintiffs, for goods purchased from them, and that at the time he transferred the note to the plaintiffs he was indifferent whether they took it or not, as he considered some of the parties thereto as good as George Collier, (who is known to the court and jury as a very rich man.) Witness did not know whether defendant saw the note or not. The witness received a copy of the record of the suit in Lowndes county, Mississippi, brought by the plaintiffs against Ewing F. Calhoun, the maker of the note, and Judah Barrett and Sterling Tarpley,

the endorsers; but witness could not say whether he received the copy from Mr. Adams, the agent of the plaintiffs, or from the defendant, or from Mr. Gamber, the counsel of the defendant. The defendant in his conversation with witness was aware of the nature of the plaintiffs' claim against him, and objected to the claim, alleging that the plaintiffs had not used due diligence to collect the amount of the note; he did not say that if he were satisfied that diligence had been used he would pay the claim; but he did say, that he was not bound to pay, and would not pay the claim; but made no other objection to the claim but want of diligence."

The plaintiffs next gave in evidence an act of the legislature of the state of Mississippi, entitled "an act to abolish imprisonment for debt," approved February 15th, 1839, which act the parties here in open court agree may be read in any court in which this cause may be pending, from the printed statutes of the state of Mississippi.

The plaintiffs then proved the handwriting of the defendant to the following letter addressed to the plaintiffs, and read the same in evidence to the jury in the words following:

"*Saint Louis, October 24th*, 1839.

"Messrs. DOREMUS, SUYDAMS & NIXON, New York:

"GENTS:—Your favor of the 11th inst. is received, and contents noted. It is quite out of our power to send you any New Orleans bills for your note on E. F. Calhoun. We trust you will before long receive a judgment for the entire debt, interest and cost, and that you will find by the virtue of an execution that 'insolvency has not passed upon them all.' Those who have gone to Texas may yet make a great rise in that fine country. We regret that the note has been so difficult of collection. We scarcely know which, you or we, made the worst trade; we have many of the goods on hand we got for it. Your friends,

"J. B. & M. CAMDEN.

*519] * "Your message to Mr. Homans, cashier, has been attended to, and delivered."

It was admitted by defendant's counsel, that the endorsements on the note given in evidence were filled up in the handwriting of Josiah Spalding, the counsel of the plaintiffs in this action, for the purposes of this suit. It was also admitted that the laws of the state of New York placed the liability of endorsers upon promissory notes on the same footing with the liability of endorsers upon inland bills of exchange under the general law merchant.

The plaintiffs having here closed their case, the defendant produced one William C. Anderson as a witness, who, being sworn, testified that he had been employed in several banks, and had conducted one in St. Louis himself; that the practice in banks in relation to notes deposited with them for collection, was to give notice to the payer of the note that it was in the bank, and when it would become due; that the effect on the credit of a payer, of a failure to pay the note when it became due, was different in eastern and western banks. In banks at the east, paper deposited for collection was considered almost as sacred as paper discounted by the banks, and a failure to pay would stop the accommodation of the payer at the bank; but in the western banks, the effect of permitting collection paper to lie over was not of much consequence to the credit of the payer. The defendant's counsel having asked the witness, whether a note presented at a bank for payment on the last day of grace, by a notary public, would be considered as having been sent to the bank for collection, within the meaning of the contract between plaintiffs and defendant, the question was objected to by the plaintiffs' counsel, and the court not only refused to allow the question to be answered, but rejected all testimony given by the witness, or which might be given, in relation to the practice of banks on notes deposited for collection, unless the witness could testify as to the practice or usage of the Commercial Bank of Columbus, mentioned in the note of Calhoun; to which opinion of the court the defendant, by his counsel, excepts.

Instructions asked by defendant.

"The defendant, by his counsel, moved the court to instruct the jury, that the plaintiffs were bound to send the note of Ewing F. Calhoun, endorsed by Judah Barrett and Sterling Tarpley, to the Commercial Bank of Columbus, Mississippi, for collection; and that, unless it is proved to the satisfaction of the jury that this was done by the plaintiffs, they must find for the defendant; which instruction was given to the jury by the court, with this explanation: That if the jury believes the note was presented at the bank, and had [?] there, by the agent of the plaintiffs, at the banking hours on the day it fell due, so as to be a valid demand on the maker, then it was duly at the bank, as required by the contract sued on. To which explanatory instruction the defendant, by his counsel, excepts.

* "The defendant, by his counsel, further moved the court to instruct the jury, that the plaintiffs were bound to use diligence by suit against Calhoun, the maker [*520

of the note, and Barrett and Tarpley, the endorsers thereof, in order to collect the money; and that if the plaintiffs neglected to prosecute their action with diligence against either of said parties, the defendant is not responsible on his endorsement of the note in question; which instruction was given by the court.

"The defendant, by his counsel, then moved the court to instruct the jury, that the record from the Circuit Court of Lowndes county, given in evidence, does not show due diligence by suit against Calhoun, the maker, and Barrett and Tarpley, the endorsers, of the note in question; which instruction the court refused to give, and in lieu thereof instructed the jury, that, so far as the record goes, it does show due diligence on part of the plaintiffs; and if the jury believe from the evidence, given in addition to the record, that the two endorsers had left the state of Mississippi, and were insolvent, and had left no property in that state, at the time the judgment was rendered, that the plaintiffs were not bound to cause executions to be sent to the counties where the endorsers respectively resided at the time they were sued. To which opinions of the court, in refusing the instruction asked by the defendant as last above-mentioned, and in giving the instruction in lieu thereof which was given by the court, the defendant, by his counsel, excepts.

"The defendant, by his counsel, then moved the court to instruct the jury, that the plaintiffs, under the law of Mississippi, were entitled to a judgment against Tarpley for the full amount of the note, notwithstanding any payment or set-off between Calhoun, the maker of the note, and Tarpley, the endorser; and that, if the plaintiffs have neglected to assert their right to such judgment, and have suffered a judgment by their neglect to pass for a smaller amount, the defendant is discharged by such neglect for all accountability for the sum thus lost; which instructions the court refused to give, because the record from Mississippi furnished all the evidence on the subject to which this instruction refers, and no negligence appears from said record in prosecuting the suit against Tarpley; to which opinion of the court the defendant, by his counsel, excepts. And the defendant, by his counsel, prays the court to sign and seal this his bill of exceptions, and that the same may be made part of the record, which is done.

"J. CATRON, [L. S.]
"R. W. WELLS, [L. S.]"

John J. Hardin, for plaintiff in error.
Z. Collins Lee, for defendants in error.

Hardin's argument was as follows:

The points now arising for the consideration of the court, are:

1. Were the instructions asked improperly refused; and those delivered in lieu thereof improperly given?

*2. Were the depositions, or any one of them, improperly permitted to be read in evidence? [*521

3. Does the record from Mississippi show the use of reasonable and due diligence?

The contract was not complied with, by defendants in error, in this:

They were to "send the said note to the Commercial Bank of Columbus, Mississippi, for collection." This they did not do, and there is no evidence that the bank ever had it for collection. It is true this note was protested for non-payment on the last day of grace; but there is a wide difference between sending a note to a bank for collection, and merely presenting it for payment on the last day of grace. Banks, universally, are collecting agents; they always give notice of the time of payment, and of the amounts due, to the debtors whose notes are left with them for collection. It is an injury to a man's credit, and not unfrequently destroys his business character, not to provide the means of paying a note left with a bank for collection, and of which he has been notified. These reasons must have operated with plaintiff in error in inducing him to require the note to be sent to the bank for collection. Calhoun, as appears from the record, lived in the town where the Columbus Bank was situated; and if he had been notified that the note was left in the bank for collection, he might have had an opportunity of providing for its liquidation. Nor will it do to say that the presentation of the note for payment was the same thing in substance as sending it to the bank for collection. The plaintiff in error did not think so, and at any rate he has required the stipulation that the note should be sent to the bank for collection by defendants in error; and the defendants in error have no right to say that, although they did not comply, they did what amounts to nearly the same thing. The sending the note to the bank for collection was a condition precedent to the liability of plaintiff in error, and should be shown to have been strictly complied with by defendants in error.

Suppose, for instance, as is the fact, though it does not appear on the record, that the note was sent to the Columbus Bank of Georgia, and did not reach the agent of defendants in error in Mississippi until the last day of grace, when it

was forthwith protested. This was not a compliance with the letter or spirit of the contract.

In this view of the case, it was proper to prove what was the usage of banks with regard to paper left with them for collection, and the testimony of W. C. Anderson, page 519, was therefore pertinent. This testimony was excluded by the court, and was therefore error.

The first instruction asked by the plaintiff in error in the court below was, therefore, proper, and was erroneously refused.

The depositions were improperly permitted to be read.

1st Objection. They were taken before a "judge of the *522] ninth *judicial district of Mississippi." The law of 1789 makes no mention of such an officer as authorized to take depositions. If it is said that such judges were judges of a "Court of Common Pleas," within the meaning of that law, it is answered, that if so, that fact should appear affirmatively in the certificate of authentication. No evidence *aliunde* being introduced, the deposition itself should contain the complete evidence that it was taken by a legally authorized officer. 1 Pet., 855.

2d Objection. The depositions were taken *de bene esse*, and the certificate does not comply either with the letter or spirit of the law. The 30th section of the Judiciary Act of 1789 provides for taking such depositions when the witness resides more than a hundred miles from the place of trial, upon giving due notice of the time and place of taking the deposition "to the adverse party, or his attorney, as either may be nearest, if either is within a hundred miles of the place of caption."

This law, being in derogation of the common law, must be strictly complied with. 1 Pet., 855; 3 Cranch, 297.

The certificate of the judge attached to each one of the depositions, states that no notification was given to plaintiff in error of the taking of the said depositions, "because neither the said John B. Camden, nor his counsel, live within one hundred miles," &c.

It was decided by the Supreme Court, 3 Cranch, 297, that in taking a deposition under a *dedimus potestatem*, the term "attorney," used in the Virginia statute, meant an attorney in fact, and not an attorney at law. The words of the Virginia statute—see Tate Dig., 210, §§ 18 and 15—are, on "giving notice to the adverse party, his attorney, or agent."

The inference from analogy, and from the decision in 3 Cranch, 297, is irresistible, that the term "attorney," used in the 30th section of the law of 1789, means an attorney in fact, and not an attorney at law.

It therefore would be no compliance with the law to certify that "neither the adverse party, nor his attorney at law, live within one hundred miles," &c. It seems to have been the idea of the judge who made the authentication, that the law of 1789 meant an attorney at law. But even if the law was construed to mean an attorney at law, the word "counsel," used in the certificate, does not meet its requisition. A counsel and an attorney are two distinct legal officers. Their duties may be, but are not necessarily, discharged by the same person. It is the province of an attorney to prepare a case, by making up the pleadings, taking depositions, &c.; whilst the counsel in the cause manages it in court after the case is prepared by the attorney to his hand. The plaintiff in error might not have had a counsel within a hundred miles, and yet have had an attorney at law. But as a counsel is neither an attorney at law or an attorney in fact, *non constat*, but that the plaintiff in error had an *attorney living [*523 within one hundred miles, and the defendants in error failed to give him notice, and therefore have had the authentication so made as to prevent this fact from appearing. The law being in derogation of a man's common law rights, and the depositions being taken *ex parte*, the authentication should exclude every conclusion which could in reason be made against the legality and formality of taking the deposition. 1 Pet., 355. They should, therefore, have been excluded from the jury.

3d Objection. The deposition of Thos. B. Winston should have been excluded, because he was not sworn to testify "the whole truth." He was sworn "to testify the truth, and nothing else but the truth." Now, the 30th section of the act of 1789, authorizing the taking of these depositions, expressly provides that "the witness is to be carefully examined, and cautioned, and sworn, or affirmed, to testify the whole truth." This was not done, and the deposition, therefore, should have been excluded. This is analogous to the case where a witness does not answer the general interrogatory, "Do you know any thing further?" Such a neglect is sufficient to vitiate the deposition. 3 Wash., 109.

4th Objection. The deposition of S. F. Butterworth should have been excluded for imperfection or diminution. It begins by stating, "That the annexed note was sued," &c.; and no note is annexed, or set out in the deposition. Nor could any one tell who were the parties to the note from any thing which is contained in the deposition, for their names are not even mentioned. The court cannot tell whether it was the note here sued on that the witness had before him, and

intended to have annexed to his deposition, or whether it was not an entirely different instrument.

This defect cannot be supplied by reference to the deposition of Winston, for that is a distinct deposition, and was taken at a different time—one being taken on 15th January, and the other on 17th February, 1842. Each deposition must be perfect in itself.

If the depositions are excluded, there is no evidence whatever of any diligence. If the deposition of T. B. Winston, the acting notary public, is excluded, there is no testimony to show that the note was even presented for non-payment at the Columbus Bank. This being required by the contract, the other testimony would not be sufficient to support the judgment. But the fact of permitting one improperly taken deposition to be read to the jury is sufficient to reverse the judgment.

The court erred in refusing the third instruction asked by plaintiff in error, which was substantially, that the record from Lowndes county does not show due diligence by suit, and also in the instruction given in lieu thereof by the court. First. The suit in Lowndes county, Mississippi, was instituted by defendants in error, against maker, and two first endorsers of the note here sued on, under a provision in the statutes *524] of Mississippi. Howard and Hutchinson's Statutes *of Mississippi, 597, sect. 38, authorizing this mode of instituting suit. A subsequent section of same law provides, (sect. 35, How. & H., 596,) "The court shall receive the plea of non-assumpsit and no other, as a defence to the merits in all suits brought in pursuance of this act, and all matters of difference may be given in evidence under the said plea. And it shall be lawful for the jury to render a verdict against part of the defendants, and in favor of the others, if the evidence before them require such a verdict, and the court shall render up the proper judgments in such verdicts against the defendants, which judgments and verdicts shall not be reversed, annulled, or set aside for want of form."

Sect. 41, same act and page, provides, that defendants shall not sever in their pleas to the merits of the action.

Another act of Mississippi, How. & H., 374, § 12, provides, that "the defendant shall be allowed the benefit of any payment, discount, or set-off, made, had, or possessed against the same, (any assigned note or bill of exchange,) previous to the notice of the assignment."

These provisions are innovations on the common law, and were evidently intended to create a new practice in pleadings, trials, and rendering up judgments. If it is not so, then the

set-off of the maker of the note, Calhoun, against the second endorser, Tarpley, was all wrong, and there was a total want of diligence in defendant in error, in not taking the case to the appellate court and having it there decided, and in permitting the case to be continued for three years, for an improper defence in the Circuit Court.

Admitting, then, that it was proper for Calhoun to claim his set-off against Tarpley, it is clear that judgment should have been rendered against Calhoun for the amount of note and interest, after deducting the amount of the set-off. But it is equally clear, that as Tarpley endorsed the note without crediting thereon the amount of the set-off, and without giving notice that there existed any such set-off, that judgment should have been rendered against him for the full amount of the note and interest. The 35th section provides expressly for such cases. And without such a provision, and a strict compliance with the law under it, most flagrant injustice would be done in numerous cases, and especially in the present instance. Tarpley endorses the note to plaintiff in error, without notice of any set-off. Plaintiff in error endorses it to defendant in error, on the faith of Tarpley's solvency. Defendant in error sues Calhoun and Tarpley, and takes a judgment against both, for the amount due from Calhoun to Tarpley, and wholly neglects to take a judgment for the amount really and justly due by Tarpley, as the law authorized. If plaintiff in error now pays up the note and interest, and goes back on Tarpley, this judgment against Calhoun and Tarpley, for less than what Tarpley was legally liable for, will be a bar to a recovery for a greater sum. The defendant in error *having thus failed to obtain a judgment as [*525
he should have done for the whole amount due, and thus having prejudiced plaintiff in error, there was not due diligence used.

The 36th section of the statute of Mississippi, How. & H., 596, provides, that "new trials shall alone be granted to such defendants as the verdicts may have been wrongfully rendered against, and judgments shall be rendered against all the other defendants in pursuance of the verdict." It appears a verdict was rendered on the 17th October, 1838, against all three of the defendants, Calhoun, Barrett, and Tarpley, for $4102.77, and judgment rendered thereon. On same page, it appears, that at same time "the defendant, E. F. Calhoun, moves the court to grant a new trial, &c." On page 28, the case is docketed "*Doremus, Suydam and Nixon* v. *Ewing F. Calhoun;*" and it states, "thereupon came on the motion of the defendant for a new trial, &c.," which motion was sustained. This

motion was made by one defendant, the reasons assigned are personal to himself, and the new trial is granted him on his motion. According to the 36th section above, judgment should have been rendered against Barrett and Tarpley, the endorsers, who did not join in the motion for a new trial, and who had no possible defence against the note. Yet defendant in error neglected to take any such judgment. And the case goes on as though they were entitled to, and had granted to them, a new trial, and no final judgment is rendered until 27th December, 1839, more than a year after, when these defendants had moved out of the state, as appears by the record. This is a clear case of a neglect of due diligence. See also a similar motion by Calhoun.

A similar neglect appears in another part of the record. Another statute of Mississippi, How. & H., 616, provides:

"Sect. 11. Every new trial at law shall be on such terms and conditions as the court shall direct; and no more than two new trials shall be granted to either party in the same cause." Now the record shows that three new trials were granted in this case. The first verdict and new trial was granted 21st October, 1837. The second on the 17th October, 1838. The third on 19th April, 1839, and the fourth and last trial was had on 27th December, 1839. All these new trials were granted on motion of defendant Calhoun; and after two were granted, it was error in the court in Mississippi, and it was gross neglect in defendants in error that they did not have it reversed. The Supreme Court of the state of Mississippi, 1 Sm. & M. (Miss.), 421, have expressly decided that the court cannot grant more than two new trials. By the neglect of defendants in error, a gross injury is done plaintiff in error in this: On the third trial, the verdict was for $4236.26, and on the last trial it was only for $3498.45; thus decreasing the amount which plaintiff in error could thereafter recover against the maker and two first endorsers.

*526] *Again: There was not due diligence shown in the record in this. There was never any service of process on defendants, Barrett and Tarpley, the first and second endorsers. There never was a writ issued to the county where Tarpley resided. They never appeared in court and entered their appearance; nor do any attorneys enter their appearance for them. It is true the pleas, which are most carelessly drawn, use the words "the said defendants say," &c.; but nowhere does it appear that they authorized an appearance; and the whole defence is conducted by the attorneys for Calhoun. It is manifestly improper that this loose mode of pleading in the name of defendants, by Calhoun's attorney,

should be construed into an appearance and defence for the endorsers; for the whole of Calhoun's defence consisted of a set-off against Tarpley; and their interests in this suit were directly conflicting. The whole proceedings, therefore, against Barrett and Tarpley, were informal; and there was want of diligence in not bringing them before the court by legal process, so that they might have had an opportunity of contesting Calhoun's set-off.

Besides this, there never was an execution, or "branch writ," issued to the counties, where, it appears from Winston's deposition, that Barrett and Tarpley resided; and in this there was a want of due diligence to use all the means of the law to collect the judgment.

There has also been an entire failure of the defendants in error to obtain payment from Barrett and Tarpley. One of them moved to South Carolina, and the other to Texas. One of them is certainly within the jurisdiction of our courts. As to the jurisdiction of our courts over the other, *adhuc sub judice lis est.*

Lee argued thus:

The defendants in error, by their counsel, respectfully submit with the record, that there is no error in the rulings and decision of the Circuit Court of the United States, for Missouri, in the questions of law raised and adjudged in this case, and that all the material and important facts in the cause were fully considered by the jury, which were necessary for them to render, as they have done, a proper and just verdict in the premises, and that the judgment ought therefore to be affirmed.

But it is objected, and now argued by the plaintiff in error, that the contract was not complied with, because "the note was not sent to the Bank of Columbus, Mississippi, for collection." The answer to this objection is obvious and conclusive, and to be found in the facts as sworn to by Thos. B. Winston, by which the court will perceive that the usual and proper demand of payment of said note was made on the 10th June, 1837, at the Bank of Columbus, Mississippi, and due notices of protest sent to the endorsers; in a word, that all which the law merchant, or bank's usage required, as to the presentation and protest of the note, was strictly complied *with; and it is apprehended that the term "for [*527
collection," used in the contract between the parties, cannot be made to express more than a legal and proper demand at the maturity of the said note; and that this was a compliance both with the contract and stipulation in the note itself; for

collection at the bank means payment thereon. The court was therefore right in limiting the action of the holders of the note to demand payment at the bank specified on the note, and during bank hours, &c. There is, besides, nothing in this record to show that any proper step was omitted, or that the plaintiff in error ever understood the contract in the sense now contended for by him.

2. As to one of the objections, that due process was not served, or suit properly instituted against Barrett and Tarpley, there can be no ground to question the regularity of the proceedings; and the court will find all necessary legal steps to have been promptly taken in strict accordance with the laws of Mississippi, to which the plaintiff in error has referred; and it is presumed that the attorney, entered upon the record as acting for Messrs. Barrett and Tarpley, acted in good faith, and by their appointment, and beyond this the court cannot now look.

The court, too, rightly rejected the testimony of W. C. Anderson, because the usage of banks, east or west, and the opinion of the witness, could not be evidence, when the contract and note in question stipulated distinctly for the collection or presentation of the said note at the Bank of Columbus, at Mississippi, whose usage alone was important to be known, and which it was presumed had been known, and governed the parties at the time the contract was made. Another objection is taken to the depositions in this case, and which it is contended were inadmissible on several grounds.

But the defendants in error now confidently submit that upon examination of the Judiciary Act of 1789, sect. 30th, 2 Laws U. S., 68, it will be found that the depositions objected to were legally taken in due form, and in compliance with the law referred to, however strictly it may be construed.

The deposition of Winston is certified to by the ".presiding judge," and that of Calhoun also by the judge of the court before whom the suit was pending; and another deposition is certified and taken by the presiding judge of the ninth judicial district of Mississippi. This being, in the language of the law, taken before "a judge, or justice," &c., &c.

The terms or titles, attorney and counsel, between which some nice distinctions are drawn in the argument, are, by common consent and usage, now regarded as convertible terms; and, indeed, the Judiciary Act, to which reference is made, does itself so speak of them. See sect. 30th.

The law meant the attorney or counsel, not in fact, as is
*528] contended, but the party's legal attorney or counsel, and generally none but *such can be of record, or act

in court; besides, the certificates to these depositions name the attorney in one or more instances.

So also as to the objection that one of the witnesses (Winston) was not sworn to tell the "whole truth." This may be a clerical or typographical omission, as the word "whole" truth is used in all the other depositions; and even were it omitted by the judge, it is submitted whether, under the true intent and meaning of the Judiciary Act, sect. 30, this would be fatal to the deposition.

Another objection as to these depositions is made with reference to an omission, as it is alleged, of the note referred to in the deposition, as the "annexed note;" but be this as it may, the court will find that the whole deposition taken together is full and distinct as to the particular note, and nothing more was required.

Finally, as to the question of due diligence: it cannot be denied that it is for the court, on the facts supposed, to determine the point of due diligence. The question only is, whether the facts contemplated by the court's direction prove "due and reasonable diligence" under the agreement of Camden & Co. with the defendants in error. Due and reasonable diligence means "reasonable diligence." But "due" and "reasonable" may, in truth, be regarded as convertible terms in this association.

Was such diligence used? The suit is shown to have been rigidly and promptly prosecuted, without the remissness of a day, and with every delay accounted for under authority superior to the party's prevention or discretion. And finally, a *fieri facias* issues instantly, and a return appears of *nulla bona*, and it is shown that the laws of Mississippi allow no *ca. sa.* It is further proved, that at the time of judgment the defendants were insolvent, and notoriously so, (or at least known to "public" rumor to be so). It is in this case found that one of the defendants had gone to Texas when the judgment was obtained; but it is not shown that that change of residence was known to these claimants, or to their counsel. And if it was, need there have been a pursuit of him into Texas, and a roving *capias* to explore for him whithersoever report might have sent him? Was this necessary, with proof, too, of actual insolvency? Due diligence can be required only because diligence may find and seize property to pay the claim—and where there is insolvency due diligence has no object, or rather consists, at the utmost stretch of obligation, in having a return on execution of *nulla bona*. This return is in fact only a test, or a form of proof, of insolvency. Substantiated otherwise, the duty of diligence has as truly

been fulfilled by simply recovering judgment, and by issuing execution upon it. Here insolvency is proved, and judicial ascertainment was not requisite. And the office of due diligence was accomplished by suit and judgment, and (though unnecessary) by the fruitless *fieri facias*.

*529] That the end of all "due diligence" is but to avail of solvency, *or to establish insolvency, and that proof of insolvency, otherwise than judicially, supersedes all steps of further diligence, various cases settle very clearly. See *Saunders* v. *Marshall*, 4 Hen. & M. (Va.), 455, 458; *Thomas* v. *Wood*, 4 Cow. (N. Y.), 172, 188; *Boyer* v. *Turner, admr.*, 3 Harr. & J. (Md.), 285, 287; *Reynolds et al.* v. *Douglass et al.*, 12 Pet., 503; and 1 Law Lib., 100, 169. The strictest exaction in such cases, however, never demanded more than a *nulla bona* to a *fieri facias* and a *ca. sa.* to succeed it. The first we have in this case; and the latter could not be had, it being abrogated by force of the law of Mississippi against imprisonment for debt. Thus, apart from the proved insolvency, we have judicially tested the means of the defendant, and exhausted all diligence.

Another suit is prescribed to us here, and to be in Texas—and that for the vain chase of an insolvent man! Not more than one suit for the exercise of diligence, wherever imposed, is required. Any other view might multiply suits through an interminable series, and all recourse to an original party, dependent on eventual and long-deferred tests of insolvency, would prove but a shadow of a right, and a mere mockery.

The last objection needs scarcely a comment, that the set-off of about $1,500 should not be allowed. This set-off is explained by Calhoun's testimony, not only substantiating the set-off, but proving that it was adversely adjudged. If so, it must, as Calhoun's testimony proves it, be regarded as an inevitable abatement from the note for which the plaintiff in error should suffer, and not the defendants, who contracted with Camden for the note as valid, for what it purported to pay.

On the whole, the defendants in error insist that the record presents a case in which, after great delay, and long and expensive litigation, by which they have performed every legal duty incumbent on them by the contract entered into in 1836, as a security to them, from the present plaintiff in error, their original debtor, for value received.

That now, after the lapse of more than nine years, they are met by objections merely technical, and with merit, which, if sustained by this honorable court, would, indeed, make the forms of the law more potent than its justice, and turn out

of the courts, remediless, and in some cases ruined, the honest creditor, who may require their protection and vindication.

Mr. Justice DANIEL delivered the opinion of the court.

No question has been raised on this record in reference to the original character of the instrument on which the action was founded as a negotiable and commercial paper, nor in reference to the duties and obligations of the parties arising purely from their positions as parties to such a paper. And for aught that the record discloses, every requirement of the law merchant, with respect to the note, or *with respect [*530 to the rights of the endorsers thereof, appears to have been fulfilled. Presentment at maturity and within due time was made at the Bank of Columbus, Mississippi, and payment there demanded; the failure to make payment was followed by regular protest, and by like notice to all the endorsers. The exceptions specifically urged by the defendant in the court below, and pressed in his behalf before this court, grow out of an agreement signed by the firm of the Camdens and by the defendants in error at the time that the note of Calhoun was endorsed by the former to the latter, and which agreement, it is contended, bound the defendants in error to undertakings and acts beyond the usual duties incumbent upon endorsers and holders of negotiable paper, and without the fulfilment of which no right of recovery against the plaintiffs in error could arise. Before entering upon an examination of this agreement and of the questions which it has given rise to, it is proper to dispose of an objection by the defendant in the court below, which seems to have been aimed at the entire testimony adduced by the plaintiffs, but whether at its competency, or relevancy, or at its regularity merely, that objection nowhere discloses. After each deposition offered in evidence by the plaintiffs to the jury, it is stated, that to the reading of such deposition the defendant, by his counsel, objected, and that his objection was overruled. A similar statement is made with regard to the record of the suit instituted in the court of Hinds county against Calhoun, the maker of the note, and offered in this cause as proof of due diligence. With regard to the manner and the import of this objection, we would remark, that they were of a kind that should not have been tolerated in the court below pending the trial of the issue before the jury. Upon the offer of testimony oral or written, extended and complicated as it may often prove, it could not be expected, upon the mere suggestion of an exception which did not obviously cover the competency of the evidence, nor point to some definite or specific

defect in its character, that the court should explore the entire mass for the ascertainment of defects which the objector himself either would not or could not point to their view. It would be more extraordinary still if, under the mask of such an objection, or mere hint at objection, a party should be permitted in an appellate court to spring upon his adversary defects which it did not appear he ever relied on; and which, if they had been openly and specifically alleged, might have been easily cured. 'Tis impossible that this court can determine, or do more than conjecture, as the objection is stated on this record, whether it applied to form or substance, or how far, in the view of it presented to the court below, if any particular view was so presented, the court may have been warranted in overruling it. We must consider objections of this character as vague and nugatory, and, if entitled to weight anywhere, certainly as without weight before an appellate court.

*581] *Recurring to the agreement signed by the parties at the time of the transfer of the note, and to the instructions given and refused at the trial, with respect both to that agreement and the proceedings had in fulfillment thereof, we will remark, as to the agreement itself, it is clear that it bound the endorsees to conditions beyond those which are implied in the ordinary transfer and receipt of commercial instruments. Their obligations, therefore, to these endorsers could by no means be fulfilled by a compliance with such usual conditions. The language of the agreement is explicit. The said Doremus, Suydams and Nixon were to send the note passed to them to the Commercial Bank of Columbus, Mississippi, for collection, and in the event of its not being paid at maturity, they were to use reasonable and due diligence to collect it of the drawer and two previous endorsers before they were to call upon the said Camdens, &c., &c. The obligation of the plaintiffs, as endorsees and holders, would have been fulfilled by regular demand, protest, and notice; from these a right of action would immediately have accrued. But the condition stipulated in the agreement is, that before they can have any right to make demand upon their endorsers, they shall diligently endeavor to collect of the maker and previous endorsers. With the view of showing a failure in the plaintiffs in fulfilling their contract, and of deducing therefrom their own exemption from responsibility, the defendants first offered a witness to prove a difference in the practice prevailing in eastern and western banks with respect to the management of paper deposited with them for collection; and inquired of the witness whether a note presented at a bank for

payment on the last day of grace by a notary public would be considered as having been sent to the bank for collection, within the meaning of the contract. This question, on motion of the plaintiff's counsel, the court refused to allow, and rejected all testimony by the witness in relation to the practice of banks as to notes deposited for collection, unless the witness could testify as to the practice or usage of the Commercial Bank of Columbus. The ruling of the court on this point we think was proper. The note was made payable at the Commercial Bank of Columbus; by the agreement between the parties it was moreover expressly stipulated, that it should be sent to that bank for collection; if, then, any custom or practice other than general commercial usage were to control the management of the note, it was the usage of the Bank of Columbus, certainly not the particular usage of other banks not mentioned in the contract, and perhaps never within the contemplation of the parties to that contract. The next exception is taken upon an instruction asked of the court to the jury, that unless it was proved to their satisfaction, that the note was sent to the Bank of Columbus for collection by the plaintiffs, they must find for the defendant. The court responded affirmatively to the proposition that the note should have been sent to the Bank of Columbus for collection, but declared *its opinion that by presentment and demand of payment of the note at maturity by the plaintiffs at the said bank, within banking hours, so as to make a legal demand on the makers, the requirement of the contract in this particular would be complied with. A nice distinction might be made between the language of the agreement and that of the instruction given upon this point. The distinction, however, we should deem to be more apparent and verbal than substantial, and not to be applicable either to the intention of the parties, or to the real merits of the case. The note was payable at the Commercial Bank of Mississippi. The maker of the note resided in the county in which the bank was situated; the endorsers Barrett and Tarpley, who were to be looked to for payment before proceeding against the Camdens, were also residents of the state of Mississippi. Every party upon the note must be presumed to have been cognisant of its character, and to have known when and were it was payable; and was bound to prepare for his respective responsibility arising from his undertaking. Other notice than that to which the law entitled him from his peculiar position upon the note, he had no right to claim. It would be going too far, then, to imply any other right, or to admit it upon ground less strong than that of express and unequivocal contract. The language [*532

of the agreement we hold not to amount to this, and as being satisfied with the interpretation that the note should be regularly presented and payment thereof demanded at the Commercial Bank of Columbus, simply as one of the means of collection to be adopted before recourse should be had to the last endorsers.

But it has been contended, that had the note been placed under the management of the bank itself, notice might have been given by the bank to the maker and prior endorsers, before the maturity of the note, and that, thereby, provision might have been made to meet it when due. In reply to this argument, it may be said, that the agreement itself expresses no such purpose or object, in requiring the note to be sent to the bank, and we do not think that such an object is necessarily implied in the requisition. In the next place, there is no proof that the bank would have given notice to the maker and endorsers, previously to the maturity of the note; nor is there any thing in the record to show that this would have been in accordance with its practice in similar cases. Under the silence of the contract itself, and in the absence of proof *dehors* the agreement, we are not at liberty to set up a presumption, which neither the language of the agreement nor justice to the parties imperatively calls for.

The defendants also excepted to the opinion of the court, given upon a prayer to instruct the jury, that the record of the suit by the plaintiffs, against the maker and prior endorsers of the note, did not show due diligence as to those parties. This instruction the court refused, but in lieu thereof instructed the jury, that the record was proper evi-
*533] dence to show due diligence on the part of the plaintiff, *and that if they believed, from the evidence submitted in addition to the record, that the endorsers Barrett and Tarpley had left the state of Mississippi, were insolvent, and had left no property in the state at the time of the judgment in the said record, the plaintiffs were not bound to send executions to the counties in which those endorsers respectively resided at the time when suit was instituted against them. This court can conceive no just foundation for this exception to the ruling of the Circuit Court. The condition to which the plaintiff was pledged, was the practice of due, that is, proper, just, reasonable diligence; not to the performance of acts which were obviously useless, and from which expense and injury might arise, but from which advantage certainly could not. The diligent and honest prosecution of a suit to judgment, with a return of *nulla bona*, has always been regarded as one of the extreme tests of due diligence.

This phrase, and the obligation it imports, may be satisfied, however, by other means. The ascertainment, upon correct and sufficient proofs, of entire or notorious insolvency, is recognized by the law as answering the demand of due diligence, and as dispensing, under such circumstances, with the more dilatory evidence of a suit; evidence which, in instances that it may be easy to imagine, might prove prejudicial alike to him who should exact, and to him who would supply it. *Dulany* v. *Hodgkin*, 5 Cranch, 333; *Violet* v. *Patten*, Id., 142; *Yeaton* v. *Bank of Alexandria*, Id., 49. We hold, therefore, that, both as to the instruction refused and as to that which was given upon this prayer, the decision of the Circuit Court was correct.

We come now to the last exception taken to the opinion of the Circuit Court upon the points presented to it. The defendant in that court insisted, that, by the law of Mississippi, the plaintiffs were entitled to a recovery of the full amount of the note, against the maker and endorsers, subject to no set-off between the maker and endorsers; and that, if the plaintiffs had, by their neglect, permitted a judgment for a smaller amount, the defendant was discharged from all accountability for the sum thus lost. The court refused so to lay down the law, because the record from the court in Mississippi furnished the only evidence to which the instruction prayed for referred, and no negligence appeared, from the record, in the prosecution of the suit against the defendants thereto. This refusal of the court was clearly right, and the reason assigned for it is quite satisfactory. The question to which the instruction asked was designed to apply, was that of due diligence. The timely and *bona fide* prosecution of a suit is, perhaps, the highest evidence of due diligence. If, in the conduct of that suit, the party should be impeded or wronged, by an erroneous decision of the tribunal having cognisance of his case, that wrong could, on no just principle, be imputed to him as a fault. It certainly does not tend to show him to have been the less diligent *in the [*584 pursuit of his claim; and least of all should he be prejudiced thereby, when the error insisted on has been induced by the person who seeks to avail himself of its existence.

Upon the whole, we consider the rulings of the Circuit Court, upon the several points before it, to be correct; its judgment is, therefore, affirmed.

UNITED STATES *v.* ANDREW HODGE.

If the citation be signed by the clerk, and not by a judge of the Circuit Court, or a justice of the Supreme Court, the case will, on motion, be dismissed.[1]

Mr. Chief Justice TANEY delivered the opinion of the court on a motion to dismiss this case.

This case is brought here by a writ of error to the Circuit Court for the eastern district of Louisiana, and a motion has been made to dismiss it, because the citation was signed by the clerk, and not by a judge of the Circuit Court, or a justice of the Supreme Court, as directed by the act of Congress of 1789, ch. 20, sect. 22.

The defendant is not bound to appear here, unless the citation is signed in the manner prescribed by law; and as that has not been done in this case, the writ must be dismissed.

THE STATE OF MARYLAND, FOR THE USE OF WASHINGTON COUNTY, PLAINTIFF IN ERROR, *v.* THE BALTIMORE AND OHIO RAILROAD COMPANY, DEFENDANTS.

The state of Maryland, in 1836, passed a law directing a subscription of $2,000,000 to be made to the capital stock of the Baltimore and Ohio Railroad Company, with the following proviso, "That if the said company shall not locate the said road in the manner provided for in this act, then, and in that case, they shall forfeit $1,000,000 to the state of Maryland for the use of Washington county.

In March, 1841, the state passed another act repealing so much of the prior act as made it the duty of the company to construct the road by the route therein prescribed, remitting and releasing the penalty, and directing the discontinuance of any suit brought to recover the same.

The proviso was a measure of state policy, which it had a right to change, if the policy was afterwards discovered to be erroneous, and neither the commissioners, nor the county, nor any one of its citizens acquired any separate or private interest under it, which could be maintained in a court of justice.[2]

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[1] FURTHER DECISIONS. 6 How., 279; 13 Id., 478. FOLLOWED. *Villabolos* v. *United States*, 6 How., 81. CITED. *Castro* v. *United States*, 3 Wall., 50.

[2] RELIED ON. *Butler* v. *Pennsylvania*, 10 How., 417. CITED. *State Bank of Ohio* v. *Knoop*, 16 How., 408. There is no more doubt that a legislature may remit a penalty due the state, or the right to enforce a forfeiture, than an individual may waive the right to enforce a contract, or forfeiture incurred under it. So where an officer had seized goods for a violation of the revenue laws, and under which seizure he was entitled to a

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*It was a penalty, inflicted upon the company as a punishment for disobeying the law; and the assent of the company to it, as a supplemental charter, is not sufficient to deprive it of the character of a penalty.

A clause of forfeiture in a law is to be construed differently from a similar clause in an engagement between individuals. A legislature can impose it as a punishment, but individuals can only make it a matter of contract. Being a penalty imposed by law, the legislature had a right to remit it.[8]

THIS case was brought up by writ of error, under the 25th section of the Judiciary Act, from the Court of Appeals for the Western Shore of Maryland.

The facts were these:—

On the 4th of June, 1836, (Laws of Maryland, 1835, chap. 395,) the legislature of Maryland passed an act entitled "An act for the promotion of internal improvement," by which subscriptions were directed to be made, on certain terms, to the capital stock of the Chesapeake and Ohio Canal Company, and Baltimore and Ohio Railroad Company, to the amount of $3,000,000 to each company. The conduct of the canal company having no bearing upon the question involved in the present suit, it is not necessary to notice any further the parts of the law which related to it.

A part of the 5th section of the act was as follows:

"And the said treasurer shall not make any payment aforesaid for subscription to the stock of the Baltimore and Ohio Railroad Company, until after a majority of the directors appointed therein on behalf of this state shall have certified to the treasurer in writing, supported by the oath or affirmation of a majority of said directors, that they sincerely believe in their certificate and statement, that, with the subscription by this act authorized to be made to said company's stock, and with the subscription which the city of Baltimore may have made by virtue of an act, passed at December session of the year eighteen hundred and thirty-five of this Assembly, or that independently of any subscription by any other public

part of the goods, it was held that Congress could forgive the offence, release the goods, and deprive the officer of his claim. *McLane* v. *United States*, 6 Pet., 404, 426; even after judgment, if the law allowing the remission was passed before the seizure. *Dorsheimer* v. *United States*, 7 Wall., 166; *Confiscation Cases*, Id., 454; *The Palo Alto*, 2 Ware, 344; *United States* v. *Three Parcels of Embroidery*, 3 Id., 75; *United States* v. *Collier*, 3 Blatchf., 325, 346; *United States* v. 100 *Barrels*, 1 Low., 244; 25,000 *Gallons of Distilled Spirits*, 1 Ben., 367. But in *United States* v. *Harris*, 1 Abb. (U. S.), 110, it was held that after a judgment in proceedings for a fine, penalty, or forfeiture has been rendered, of which a moiety has become vested in an informer or other individual, it is not within the power of the President by a pardon to remit or release the moiety thus accruing to the individual.

[8] RELIED ON. *East Hartford* v. *Hartford Bridge Co.*, 10 How., 535. CITED. *United States* v. *Tynen*, 11 Wall., 95. See also, *The Assessor* v. *Osborne*, 9 Wall., 575; *Tinker* v. *Van-Dyke*, 1 Flipp., 527; *Speckert* v. *City of Louisville*, 78 Ky., 280.

authority than the city of Baltimore, as aforesaid, and of the cities of Pittsburg and Wheeling, and exclusive of any loan secured to it, exclusive of all future profits and debts due by the company on interest, the said railroad company in their opinion have funds sufficient to complete the said railroad from the Ohio river, by way of and through Cumberland, Hagerstown, and Boonsborough, to its present track near to Harper's Ferry; and it is hereby declared to be and made the duty of the said company to, and they shall so locate and construct the said road as to pass through each of said places; which certificate of said directors shall be accompanied by an estimate or estimates of one or more skillful and competent engineers, made out after a particular and minute survey of the route of said road by him or them, and verified by his or their affidavit, showing that the whole cost of said work will not be greater than the amount of funds the said directors *536] shall certify to have been received by said *company, and applicable to the construction of the said road: Provided, That if the said Baltimore and Ohio Railroad Company shall not locate the said road in the manner provided for in this act, then, and in that case they shall forfeit one million of dollars to the state of Maryland for the use of Washington county."

This act was accepted by the railroad company, in a general meeting of stockholders, and information thereof communicated to the governor, on the 26th of July, 1836.

On the 24th of September, 1836, the treasurer made his subscription of $3,000,000 to the capital stock of the company.

On the 1st of October, 1838, a majority of directors on behalf of the state gave the certificate and statement required by the act.

The railroad company having finally located, and being in the act of constructing their road, without the limits of Washington county, within which Hagerstown and Boonsborough are situated, a suit was brought in Frederick county, Maryland, in February, 1841, in the name of the state of Maryland, for the use of Washington county against the railroad company in an action of debt to recover $1,000,000.

In March, 1841, the legislature of Maryland passed an act in which they say, "that so much of the 5th section of the act of 1835 as makes it the duty of the Baltimore and Ohio Railroad Company to construct the said road so as to pass through Hagerstown and Boonsborough, be and the same is hereby repealed; and that the forfeiture of one million of dollars reserved to the state of Maryland as a penalty, in case the said Baltimore and Ohio Railroad Company shall not

locate the said road in the manner provided for in that act, be and the same is hereby remitted and released, and any suit instituted to recover the same sum of one million of dollars, or any part thereof, be and the same is hereby declared to be discontinued and of no effect."

In October, 1841, the defendant pleaded the general issue, and set forth the above act.

In February, 1842, the case came on for trial, upon the following agreed statement of facts:

"It is admitted in this case, that the commissioners of Washington county, the parties at whose instance this action was instituted for the use of Washington county, were at the time of institution of this suit, and still are a body corporate, duly elected and organized, under and by virtue of the act of Assembly of Maryland of 1829, chap. 21, and its supplementary acts. It is also admitted that the defendants are, and were at the institution of this suit, a body corporate, duly existing under and by virtue of the act of Assembly of Maryland of 1826, chap. 128, and its supplementary acts. It is also admitted that this suit is brought at the instance of said commissioners of Washington county to recover, for the use of said county, the $1,000,000 which they allege to be forfeited to the said *state, for the use of said county, [*537
under the provisions of the 5th section of the act of 1835, chap. 395; and it is admitted that the said defendants have not, and had not at the institution of this suit, constructed or located their road from the Ohio river, by way of and through Hagerstown and Boonsborough, to the track of said road at Harper's Ferry, as the same existed at the time of the passage of the said act of 1835, chap. 395; but, on the contrary, had at the institution of this suit finally located, and are, were then, and are now constructing their said road by a different route, and without the limits of Washington county, within which the said Hagerstown and Boonsborough are situated. It is admitted that the said Baltimore and Ohio Railroad Company, in general meeting of the said corporation, did accept, assent, and agree to the several provisions of the said act of 1835, chap. 395, and did duly communicate their said approval, assent, and agreement, under their corporate seal and the signature of their president, to the governor of this state, in the manner and within the time prescribed by the said act; which approval, assent, and agreement, together with the report of the engineer of the said railroad company, which was required by the said act to accompany the same, were as follows, viz.:"

(The statement then set out all these documents *in extenso*.

The engineer framed his estimates for a road to Pittsburg which would cost $6,681,468. That part of it passing through Washington county is thus described. "The route departs from the Baltimore and Ohio Railroad at the mouth of the Little Catoctin, ascends that stream to the eastern base of the Blue Ridge or South mountain, and thence continues to ascend along its slope to a depression in its crest, called 'Crampton's Gap;' thence passing through the mountain by a tunnel of 1500 feet in length, it descends into 'Pleasant Valley,' lying between the South mountain and the Elk mountain, and proceeds along the western base of the former, to and through the town of Boonsborough; thence to a point near the village of Funkstown; and thence across the Antietam creek, above the Turnpike bridge, to the borough of Hagerstown; thence through the streets of that town, and over Salesbury ridge, to and across the Conococheague creek, about two miles north of Williamsport; thence" &c., &c.)

"It is also admitted, that after this suit was instituted for the purpose of recovering the said forfeiture of a million of dollars, the legislature of Maryland, on the 10th day of March, 1841, passed the act of December session 1840, chap. 260, repealing the said 5th section of the said act of 1835, chap. 395, as far as relates to the said forfeiture of a million of dollars, and releasing the said defendants from the said forfeiture, *538] and every part thereof, and directing any suit instituted to recover the same to be discontinued, and to *have no effect. It is also admitted, that the said repealing act of 1840, chap. 260, was passed upon the following memorial of the said defendants to the legislature, and that at the time of passing the same there was then before the legislature a counter-memorial upon the said subject from the said commissioners of Washington county, which memorial and counter-memorial, it is agreed, were as follows, to wit:"

(These documents are too long to be inserted.)

"It is further admitted and agreed, that the several acts of Assembly herein particularly referred to, as well as any other acts or resolutions of the General Assembly of Maryland, that either party may deem applicable in the argument of this case, either in the County Court, or Court of Appeals, or Supreme Court of the United States, should the case be hereafter carried by either party to said courts, or either of them, shall be read from the printed statute-books, and have the same effect and operation in the case, as if duly authenticated copies thereof were made a part of these statements.

"It is further agreed that all errors of pleading and of form in any part of the proceedings of either party in this case are

waived; it being the object and understanding of the parties that the matters of right in controversy between them shall be fairly and fully presented to all or either of the said courts, in which the same may be pending, and that either of the said parties shall have his pleading and proceedings considered as being as perfect as they could be made to give him the benefit of the case here stated. It is admitted that this suit was the only suit ever brought by the said commissioners, or at their instance, to recover the said forfeiture of a million of dollars, and was pending when the said act of 1835, chap. 395, was passed. Upon this statement it is further agreed that, if the court shall be of opinion that this action could not be maintained if the said repealing act of 1840, chap. 260, had not been passed, or that the operation and effect of that repealing act is to release the said forfeiture of $1,000,000, and to discontinue and put an end to this suit, then judgment to be entered for the defendants, otherwise such judgment is to be entered for the plaintiffs as the court may think right and proper. It is further agreed that the county court shall enter judgment *pro forma* for the defendants. The plaintiff to have the same right to take up the case by appeal or writ of error, to the Court of Appeals, or ultimately to the Supreme Court of the United States, as if the judgment in the county court had been rendered upon demurrer, or upon a bill of exceptions taken in due and legal form upon the facts hereinbefore agreed upon."

Upon this statement of facts the court of Frederick county gave judgment for the defendant, and the case being carried to the Court of Appeals, the judgment below was affirmed.

The writ of error was brought to review this judgment.

**Jervis Spencer* and *Sergeant*, for the plaintiff in error. [*539
Nelson (attorney-general) and *Johnson*, for defendants.

Spencer, for the plaintiff in error, made the following points:

1. That the act of 1835 is a contract.
2. That Washington county is a party to that contract.
3. That the forfeiture is in no sense a penalty.

1st. It is not for any criminal or prohibited act amounting to a public offence.

2d. It is not introduced *in terrorem*, but is a sum to be paid for using the license given by the act as a compensation to the injured party.

4. That, by the use of the license by the company, Washington county acquired a vested right in the sum stipulated to be paid.

5. That to take away this right from Washington county would be inequitable, unjust, and contrary to the first principles of the social compact; and therefore the act ought to be so construed, if possible, as to avoid that result; and it may be so construed by confining its operation to whatever right the state had, if any. The state might release her own power over the matter, leaving in force the right of the county.

6. If otherwise construed, it is repugnant to the state constitution, and void.

7. In the same view, it is repugnant to the Constitution of the United States, and void.

And then said—

This suit is brought in the name of the state of Maryland, to recover $1,000,000, which is claimed by the county, under the provisions of the 5th section of the act of the legislature of Maryland, at the session of 1835, chap. 395, which are substantially set forth in the declaration.

It is maintained, to support the claim of the plaintiff, that the whole act constituted a contract between the state and company; and the 5th section a part of said contract, in which the county is a party beneficially interested.

The provisions of the 1st section of the act are in the very terms of contract, and embrace the 5th section as well as the rest of the law: "If the railroad company shall approve, assent, and agree to the several provisions of this act so far as they are applicable to said corporation," &c. The approval, assent, and agreement of the company were given as provided for by the act, and that agreement gave vitality to the whole law. The state offered, and the company accepted the offer, on mutual considerations. It was the *congregatio mentium*, which is of the very essence of contract.

The case stated shows that at the time of commencing this
*540] suit, the road had been located out of the limits of Washington county, and that, under the law, the company was liable to pay the money.

But the defence relies on the act of 1840, chap. 260, which undertakes to repeal the provision of the act of 1835, chap. 395, under which the claim is asserted; and the question is, whether that act of 1840 violates the 10th section of the Constitution of the United States.

The first aspect in which the question is to be examined is, whether the 5th section is part of a contract at all, or only criminal penalty, which it is maintained to be by the defendant. We maintain that it is not only contract, but that it could have no operation as criminal penalty.

What is a contract? Chitty on Contracts, 1, &c.; *Canal Company* v. *Railroad Company*, 4 Gill & J. (Md.), 128, &c.

The Court of Appeals say, we must look to concurrent legislation to find the meaning of the 5th section; and refer to the act of 1840, chap. 260, which uses the term "penalty." But could the act of 1840, after the suit was brought, alter the character of the thing? If it was contract when the suit was brought, the act of 1840 could not make it criminal penalty. The legislature could not stretch the shoe or contract it, and make the previous law mean one thing or another, as they might choose to call it, and when they had a manifest motive in endeavoring to alter its character.

Concurrent legislation, prior to the act of 1840, proves that the legislature understood it as contract, and nothing else. The act of 1826, chap. 123, § 14, which was the original charter, authorized the company to enter upon any lands for a location. Afterwards, by the act of 1827, chap. 104, § 3, the legislature thought proper to restrict the company to a location within Frederick and Washington counties, but did they do it by a criminal enactment? No. They knew they could not do that, and they entered into a distinct contract for the purpose. Stress is laid by the other side on the fact that the terms of contract are used in the same section of the act of 1827, which makes the restriction; and the inference is deduced that if the 5th section of the act of 1835 were intended to be contract, the terms of contract would have been used in that section also. But the important fact is entirely overlooked, that the words of contract, in the first section of the act of 1835, embrace the whole act; whereas, in the act of 1827, there were no such general words of assent and agreement to the whole act, but they applied only to the respective sections.

The Court of Appeals refer to the 9th section of the act of 1835, and say that, inasmuch as a special contract was required to be made by that section, therefore the legislature could not have intended to make the 5th section contract. This construction cannot be justified. It would involve the construction that many of the most essential stipulations of the company are not its contract, because *the particular sections in [*541
which they occur do not require other special contracts with reference to the same. The 9th section required a distinct contract, in order that if the state should ever have occasion to sue on it, the suit should not be embarrassed by all the various matter embraced by the law. It was an arrangement of convenience. When the company agreed to the law, and accepted the same, it was under contract to fulfil

the 9th section by an additional contract. That section was a contract, to be performed by entering into another contract; and it was as much a contract as the subsequent contract would be such, after it should be entered into.

There are thousands of instances of this, where contracts are in part, or the whole, to be performed by entering into other contracts.

The right to choose a location was a vested franchise of the company, its property, which the legislature of Maryland had no right to interfere with by a criminal enactment. *Canal Company* v. *Railroad Company*, 4 Gill & J. (Md.), 144. The obligation to go through Frederick and Washington counties, under the act of 1827, was released by the act of 1831, chap. 251; and the company stood untrammelled, without any power of control by the legislature. Their contract or agreement was absolutely essential to bind them down to any particular location. The 5th section, in any other sense but contract, is a dead letter.

It has been asked, suppose the act had said that the company should be liable to Washington county in damages, would that be contract? And again, that if the road should leave the prescribed points it should be a misdemeanor, would that be contract? It is submitted, that it would be, in both cases. The courts have said, in the authorities I have read, that the right to choose a location is the property of the company, and it could be liable neither for damages nor a misdemeanor, for using properly its own property. It might contract to use its property in a certain way, and if nothing be said about damages for the breach, a liability for such damages is implied in every contract. To declare, in express terms, what is implied in every contract, certainly would not vitiate it. Private individuals could not contract that the act of one should be a misdemeanor, but a misdemeanor is an offence against the state, and surely a party who has an absolute right to do a thing independent of legislative control, may contract with the state that he will not do it, and if he does, it shall be a misdemeanor. A state may do many things, in the way of contract, that an individual cannot do, for there is no public policy to restrain her, nothing but the written Constitution.

There is another kind of penalty which is the penalty of a contract. This is not such a case, but it is the actual contract of the party to pay the million, in the event which has happened. 2 Pothier on Obligations, 86, &c., 93, 94, 95, 96; 7 Wheat., 18.

*542] Washington county had a good subsisting interest in the contract. *If any consideration were necessary to

sustain the use, it amply exists in the moral obligation which the state owes to the people to protect their interest and nourish their prosperity. The Court of Appeals say, that, "as a county, she stands to the state in the relation of a child to a parent;" and this would furnish consideration enough. *Green* v. *Biddle*, 8 Wheat., 151; *Lloyd* v. *Spillet*, 2 Atk., 149.

But no question of consideration can arise here, as the acceptance and contract of the company is under the solemnities of a seal, which implies a consideration.

No consideration is necessary. *Dartmouth College* case, 4 Wheat., 698; 3 Story Const., 257, 258; *Carnigan* v. *Morrison*, 2 Metc. (Mass.), 396; Willis Trustees, 216; *Cooker* v. *Child*, 2 Lev., 74; 4 Kent Com., 307, and cases there referred to.

The sovereignty of a state is above the restrictions of the common law and the statutory law. They must all yield to the sovereign will; and what would be necessary to the contract or grant of an individual would by no means be necessary to the same things of a state.

Even though Washington county had been ignorant of the provision in the law, made for her benefit at the time of its passage, she could have availed herself of it; and she did affirm it when she instituted the suit, if not before. 4 Kent. Com., 307, &c.

The use declared in the act of 1835 ought to be as sacred as any other right of property. It is property to the county. It is vested under the law of the state. It vests under the same sanction which secures to a citizen his estate. It is an interest in a contract, vested under the sacred sanction of the law, and is inviolate under the Constitution.

The county enjoyed great advantages before the construction of this road. One of the greatest thoroughfares in the country (the great national road) passed for fifty miles through her territory. Twenty four-horse stage-coaches, filled with passengers, daily passed over the road, and it was constantly lined with immense wagon-teams, travelling to and from the great west. All these people and horses had to be fed. It made a most profitable market for our farmers. Houses were built all along the road, to accommodate the custom. It is now all gone. The farmers lose the profits of their provender and marketing; the whole country feels the depression; and the houses which were a few years ago comfortable inns, and profitable to their proprietors, are going to decay, a dead loss. The million we seek to recover can never indemnify the county for the injury she has sustained.

Maryland was about to apply large sums to the construction of this great work, (the Baltimore and Ohio Railroad;) the

means were to be obtained in part from Washington county; and could any more cruel injustice be conceived than *543] for the state to appropriate *the money of the people, and pledge the property of Washington county, for the construction of a work which would take from the county all the benefits it enjoyed? Surely every principle of justice and moral duty required that the state should protect the county; and the stipulations of the 5th section were no doubt intended for that.

The state was a mere trustee after the contract was made, and could not deny to the county the right to use her name in bringing the suit. *Payne* v. *Rogers*, 1 Doug., 407; *Carter & Moore* v. *Insurance Company*, 1 Johns. (N. Y.) Ch. R., 463; *Green* v. *Biddle*, 8 Wheat., 89; *Kierstead* v. *The State*, 1 Gill & J. (Md.), 246.

It has been argued, by the other side, that the state has entire control over the corporation of Washington county, and can destroy it at her pleasure. We admit that the legislature has absolute control of the political powers of a political corporation, to amend, or modify, or repeal them. But as long as the corporate organization continues, the county is as capable of taking as a natural person, and its contracts are equally protected. The act of 1829, chap. 21, sect. 3, incorporates the commissioners of Washington county, and enables them to hold all kinds of estate. The Constitution made no distinction in the classes of contracts whose obligation was forbidden to be impaired, but protects those made by corporations equally with those made by individuals. *Green* v. *Biddle*, 5 Pet. Cond. Rep., 390.

The right of a legislature over charters does not imply a right to the property held under those charters. 9 Cranch, 335; 16 Mass., 84, 85, 86; 2 Kent Com., 275, 3d ed.

Nelson, attorney-general, for defendants in error, referred to and commented on the various laws of Maryland respecting the railroad company, and said, that the only question in the case was, whether the act of 1840 was valid and legitimate. Upon this point three propositions could be stated—

1. The proviso in the preceding act, which declares a forfeiture, imposes it as a penalty.

2. If it be a penalty, the legislature had a right to remit it, and did remit it.

3. If the stipulation in the 5th section of the act of 1835 be a contract in its nature, the legislature was competent to release it, and did so.

1. Is the proviso a contract or mere penalty? This must be

answered by a reference to the terms of the act, to the circumstances under which it was passed, and to acts *in pari materia*. Let us examine each. The 5th section prescribes a duty to be performed by the railroad company. It says, "It shall be the duty of the company," and the performance of it is sanctioned by a forfeiture. The language is not that they shall pay if they fail to comply, but that *they shall forfeit [544 $1,000,000. What is a forfeiture? It is a penalty imposed by a superior power for an omission to perform a duty. The terms of the act, therefore, mean a penalty by denouncing forfeiture as a punishment. The act of 1837, 4th section, contained an offer to the company, which was not accepted; but its language is, that it shall "not be construed to repeal the forfeiture to Washington county." The act of 1840 contains the same idea; it remits a forfeiture. In the act of 1835, different expressions are used in the 7th and 9th sections, where it is declared that "the company shall bind itself by an instrument to pay," &c.; and in the 14th section, where the duty of providing transportation is imposed upon the company, they are made liable to an action by any party aggrieved. In the 5th section, it is not the less a penalty because the amount is ascertained. If the legislature meant the obligation in the 5th section to rest on contract, can it be accounted for that they did not use the appropriate terms, when they did so in the 7th and 9th sections? It has been said, that the railroad company assented to the act, and that it thus became a contract. But the assent was given to the act as it stood, with the penalty in it. Assent to it did not change a penalty into a contract. The act of Virginia contained penalties for wronging persons, but by accepting this the company left it optional with the proper authorities of Virginia whether to enforce the penalties or not.

2. If it be a penalty, has the legislature the power to release it? Whether injustice was or was not done to Washington county, was a question for the legislature to decide, but not for this court, which must *jus dicere* and not *jus dare*. In England, the king cannot remit a penalty where private rights are involved, but parliament can. 2 Bl. Com., 437, 446; 1 W. Bl., 451.

Where a forfeiture is imposed by act of Congress, and the law expires, the forfeiture cannot be enforced, although there was a judgment below. 1 Cranch, 104; 5 Id., 281; 6 Id., 203, 329.

Decisions in the different states are uniform on this point. 2 McCord (S. C.), 1; 2 Bail. (S. C.), 584; 1 Mo., 169; Breese (Ill.), 115; 1 Murphy (S. C.), 465; 1 Stew. (Ala.), 346; Allen (N. H.), 61; 4 Yeates (Pa.), 392.

It is clear, therefore, that if this provision is in the nature of a penalty, the law of 1840 is valid.

8. Suppose, however, that the stipulation is in the nature of a contract, had the legislature power to release it? The act of 1840 professes to release it, whether it be contract or penalty. It is not denied that a state may make a contract, and if she does, that she cannot break it. The Constitution intended to protect private property, whether of corporations or individuals. Is Washington county such a person? We say, that she can have no interest separate from the state. She is a component part of
*545] Maryland, and is separate only for the purpose of executing the sovereign will of *the state. The distinction between public and private corporations must exist in such a case, if it exists at all. In 1804 the Levy Court was incorporated, the justices of which were appointed by the state, but they had no power to levy taxes, nor any other power, except that which was conferred upon them by law. In 1839, commissioners were authorized by law to supersede the Levy Court, with the same powers. They cannot be the *cestui que use* of the state, for they had no authority to accept such a use, and could not appropriate the money, if it were given to them. The state could pass a law, directing the purpose for which it should be expended, and even order it to be paid over to the railroad company. Maryland can abolish Washington county. Suppose that on the day after the forfeiture the county were to be annihilated or broken up, and partitioned amongst the adjacent counties, what would be done with the funds on hand? It would be for the state to prescribe their direction. 9 Cranch, 43, 52, 292.

If the distinction between public and private corporations be that interests are protected, all are protected, because there can be no litigation without interests. 4 Wheat., 629, 680, 659, 660, 693, 694; 13 Wend. (N. Y.), 325, 334, 337.

Was a right of action such a property as is protected? The penalty was never reduced into possession, and the state had a right to defeat the remedy when it was sought by a suit in its own name. All the points in this case are covered by 1 Mo., 169. Counties are public corporations, and can be changed or modified at the pleasure of the state. Breese (Ill.), 115.

In the case of the town of Pawlet private interests were involved; it was not intended to throw the shield of protection over public property. The public may do what they please with their own. A legislature cannot repeal a charter, and take the property of individuals; but if you refuse to

it the power to control public funds, you strip it of a useful and legal authority.

R. Johnson argued upon the same side, but of his argument the Reporter has no notes.

Sergeant, for plaintiff in error, in conclusion, stated the facts in the case, referred to the acts of Assembly, and then argued that the proviso in the act of 1835 was not a penalty. There was an alternative, an option given to the railroad company, either to make the road as directed, or to pay the money. The nature of the proviso was perfectly understood by the legislature. The previous part of the law enacted, that the company should pass through three towns. Had the law stopped there, the obligation would have been complete, under the penalty, as it is said by the other side, of forfeiting their charter. But the proviso makes a difference. If the company choose to pay the money, they may decline to obey the enacting clause. The difference between a law and an agreement is, that [*546 *the one is binding absolutely, and the other not without an assent. But here the company were required to signify their assent to the law, which shows that the legislature thought they were making a contract. When a state becomes a contracting party, she acts with no higher power than an individual, except that sometimes persons are made able to contract who would be unable, without the assistance of legislation. A confusion arises in some cases from the same power making laws and contracts; and the different mode of action must be steadily kept in view. A treaty is binding, and yet there is no exercise of a legislative power. In the case before us, the company were not bound to adopt any certain route. All that the legislature said was, that if they did not agree to pass through the three towns, they should not have the subscription of $3,000,000. It makes no difference, in a legal point of view, whether it was or was not difficult to construct the road along that route. This circumstance did not alter the contract. If they had agreed to pay the $1,000,000, the legislature could not have compelled them to pass through the towns.

The act of 1840 does not declare what that of 1835 was, but professes to annihilate it. But the legislature cannot do this. They cannot even construe the law, which is the peculiar province of a court. There is nothing in this disability derogatory to the dignity of Maryland, because it is common to all the states. Courts may look at acts which are *in pari materia*, but the examination is only to guide their judgment, and not because the legislature has a right to construe a con-

tract already made. When the Constitution of the United States protects contracts, it means that they shall be defined and construed according to received and settled principles; there is no exception of implied contracts or those made by states or corporations, public or private. Public corporations have a right to make contracts and to sue, and there is no exception of a penalty by contract, such, for example, as a bond. This court has always acted up to the letter and spirit of the Constitution, and it is a subject of rejoicing that its opinions have found their way into the hearts of the people, and become guides of action. In a convention of the people of Pennsylvania, which met not long since, an argument addressed to that body, founded on the decisions of this court, settled a question which had been much debated. It is a principle that contracts must be interpreted by the judiciary, and this is equally true of contracts made by individuals or states. All the incidents of contracts are protected also, and no equivocation or subterfuge will be allowed. The only distinction which can be made amongst penalties, is regarding crimes and contracts. No one can contract to commit a crime; it would be void. If the act of 1840 impairs the obligation of a contract, it is nugatory. Between individuals, this would be considered a case of contract, and there is in the law no exercise of the legislative power, which would *547] *have been the case if Washington county, by it, had been empowered to make a contract. But this was not necessary. The state could contract, undoubtedly, and so could the railroad company, and a third party is introduced with the consent of both. A charter is a contract; but provisions are sometimes introduced into it which are not matters of contract. 4 Wheat., 235. In the present case, the acceptance completed the contract. If you strike out of the law the words, "for the use of Washington county," there is nothing to show what was to be done with the money. But when these were inserted, it prevented the state from claiming it for herself; if she had done so, the railroad company would have been justified in refusing to pay. Here then were two parties, each capable of contracting; and as to the capacity of Washington county so to do, it was held, in the case of *Terrett and Taylor*, that the recognition of a power to contract is equivalent to a fresh grant of power. A bond between A. and B., for the use of C., admits C.'s interest, and suit must be brought in the name of the obligee. When a bond is assigned, there is an implied engagement that the assignor will do nothing to impair the interest of the other

party. A *cestui que trust* has, in equity, a control of the fund. *Black* v. *Zacharie*, decided at this term.

The act of 1835 is, in fact, a stipulation for a license to depart from a prescribed route. It has been said, by the other side, that it is a penalty, that the legislature can release it, and that if it is a contract, the legislature can annul it. If it is a penalty, and the state has released it, the question cannot come up here. We have no desire to say anything as to the power of a state over criminal penalties, such as that in 10 Wheat. It is said that Washington county was not a party to the contract. But it seems to be conceded that if it were not for the act of 1840, there would be no opposition to the claim. There was a time then, when Washington county had an interest, and this remained at the institution of the suit. If the state of Maryland were to receive the money as the plaintiff in the cause, perhaps we could not legally coerce her to pay it to Washington county. But she would be morally bound to do so. The moment that the railroad company determined not to pass through the three towns, Washington county acquired a right. The trustee and the party bound have concurred to destroy the contract, and it is only in consequence of this, that Washington county does not stand as it did at first. It has been said that the legislature could take away the remedy by which the contract was to be enforced. But the decisions of this court are uniform, that a legislature cannot take away a right, under pretence of affecting the remedy. The last case upon this point is *Bronson* v. *Kenzie*, 1 How., 311.

If the law impairs a remedy, or varies a contract a hair's breadth, it is void; and it makes no difference whether it is a general or a *special law. In the case before us, the plaintiffs are put in a worse situation than they were before, and the same thing is intended to be accomplished as if a law had been passed forbidding them to bring a suit. [*548

It is said that Washington county is a public municipal corporation, and therefore within the control of the legislature. But in the act of 1835, there was no reservation of power upon this ground. It may be that the votes of some few persons were required to pass the law, who would not have voted for it if any such reservation had been made. Men cannot be such general philanthropists as to give up the interests of their own immediate neighborhood. Suppose Washington county to have said, if you take away the road from us, you must make compensation. In such case, the law would not have been passed with a reservation in it like the one just spoken of. And if it be a contract, it is violated

for the benefit of the railroad company. The argument on the other side goes to the extent that every contract, made by a public municipal corporation, is beyond the pale of the Constitution. There is no decision of this court that such a charter and property can be taken away. One of the complaints in the Declaration of Independence is, that charters were taken away; and this practice, in part, produced a revolution in England. By this argument, they may all be swept off; and such corporations may, moreover, be asked what they are going to do with their property. It has been said, that supposing it to be a contract, it cannot inure to the benefit of Washington county. But an implication cannot be made contrary to what is expressed, or what is just and right. What Washington county is going to do with the money is of no concern to the railroad company, the true defendant in this case. It may educate the poor with it; it may pay debts, or it may erect a monument to that glorious clause in the Constitution which enables it to assert its rights in this court.

Mr. Chief Justice TANEY delivered the opinion of the court.

The question brought before the court by this writ of error depends upon the construction and effect of an act of the General Assembly of Maryland, passed at December session, 1835, entitled "An act for the promotion of internal improvement."

The original charter of the Baltimore and Ohio Railroad Company authorized it to construct a railroad from Baltimore to some suitable point on the Ohio river, without prescribing any particular route over which the road was to pass; leaving the whole line to the judgment and discretion of the company. But by the act above mentioned the state proposed to subscribe $8,000,000 to its capital stock, provided the company assented to the provisions of that law; and, among other provisions, this act of Assembly required the road to pass through Cumberland, Hagerstown, and Boonsborough; and provided also that, if the road was not located in the
*549] manner therein *pointed out, the company "should forfeit $1,000,000 to the state for the use of Washington county."

The towns of Cumberland, Hagerstown, and Boonsborough, are all situated in Maryland; the first in Alleghany county and the two latter in Washington.

This law was assented to by the company, and became obligatory upon it, and the sum proposed was subscribed by

the state; but for reasons which it is not necessary here to mention, the company did not locate the road through Hagerstown or Boonsborough, nor pass through any part of Washington, on its way from Harper's Ferry to Cumberland, to which point the road has been made; and this suit was thereupon brought, at the instance of the commissioners of Washington county, in the name of the state, for the use of the county, to recover the $1,000,000 above mentioned. After the suit had been instituted, the state, at December session, 1840, passed a law repealing so much of the act of 1835 as required the company to locate the road through Hagerstown and Boonsborough, and remitting the forfeiture of the $1,000,000, and directing any suit instituted to recover it to be discontinued.

The commissioners of Washington county, however, at whose instance the action was brought, insisted that the money was due to the county by contract, and that it was not in the power of the state to release it; and upon that ground continued to prosecute the suit; and the Court of Appeals of the state, having decided against the claim, the case is brought here by writ of error.

Undoubtedly, if the money was due to Washington county by contract, the act of 1840, which altogether takes away the remedy, would be inoperative and void. But even if the provisions upon this subject in the act of 1835 could be regarded as a contract with the railroad company, it would be difficult to maintain that the county was a party to the agreement or that it acquired any private or separate interest under it, distinct from that of the state. It was certainly at that time the policy of the state to require the road to pass through the places mentioned in the law, and if it failed to do so, to appropriate the forfeiture to the use of the county. But it cannot be presumed that in making this appropriation the legislature was governed merely by a desire to advance the interest of a single county, without any reference to the interests of the rest of the state. On the contrary, the whole scope of the law shows that it was legislating for state purposes, making large appropriations for improvements in different places; and if the policy which at that time induced it to prescribe a particular course for the road, and in case it was not followed to exact from the company $1,000,000 and devote it to the use of Washington county, was afterwards discovered to be a mistaken one, and likely to prove highly injurious to the rest of the state, it had unquestionably the power to change its policy, and allow the company to [*550
pursue a different course, and to *release it from its

obligations both as to the direction of the road and the payment of the money. For, in doing this, it was dealing altogether with matters of public concern, and interfered with no private right; for neither the commissioners, nor the county, nor any one of its citizens, had acquired any separate or private interests which could be maintained in a court of justice.

As relates to the commissioners, they are not named in the law, nor were they in any shape parties to the contract supposed to have been made, nor is the money declared to be for their use. They are a corporate body, it is true, and the members who compose it are chosen by the people of the county. But like similar corporations in every other county in the state, it is created for the purposes of government, and clothed with certain defined and limited powers to enable it to perform those public duties which, according to the laws and usages of the state, are always intrusted to local county tribunals. Formerly they were appointed in all of the counties annually, by the executive department of the government, and were then denominated the Levy Court of the county; and in some of the counties they are still constituted in that manner, the legislature commonly retaining the old mode of appointment, or directing an election by the people, as the citizens of any particular county may prefer. But, however chosen, their powers and duties depend upon the will of the legislature, and are modified and changed, and the manner of their appointment regulated at the pleasure of the state. And if this money had been received from the railroad company, the commissioners, in their corporate capacity, would not have been entitled to it, and could neither have received nor disbursed it, nor have directed the uses to which it should be applied, unless the state had seen fit to enlarge their powers and commit the money to their care. If it was applied to the use of the county, it did not by any means follow that it was to pass through their hands, and the mode of application would have depended altogether upon the will of the state. This corporation, therefore, certainly had no private corporate interest in the money, and indeed the suit is not entered for their use, but for the use of the county. The claim for the county is equally untenable with that of the commissioners. The several counties are nothing more than certain portions of territory into which the state is divided for the more convenient exercise of the powers of government. They form together one political body in which the sovereignty resides. And in passing the law of 1835, the people of Washington county did not and could not act as a community having separate and distinct interests of their own, but as a

portion of the sovereignty; their delegates to the General Assembly acting in conjunction with the delegates from every other part of the state, and legislating for public and state purposes, and the validity of the law did not depend upon their assent to its provisions, as it would have been equally obligatory upon them, if *every one of their [*551 delegates had voted against it, provided it was passed by a constitutional majority of the General Assembly. And whether the money was due by contract or otherwise, it must, if received and applied to the use of the county, have yet been received and applied by the state to public purposes in the county. For the county has no separate and corporate organization by which it could receive the money or designate agents to receive it or give an acquittance to the railroad company, or determine upon the uses to which it should be appropriated. We have already seen that the corporation of commissioners of the county had no such power; and certainly no citizen of the county had any private and individual property in it. It must have rested with the state so to dispose of it as to promote the general interest of the whole community, by the advantages it bestowed upon this particular portion of it.

Indeed, if this money is to be considered as due, either to the commissioners or to the county, by contract with the railroad company, so that it may be recovered in this suit, in opposition to the will and policy of the state, it would follow necessarily that it might have been released by the party entitled, even if the state had desired to enforce it. And if the state had adhered to the policy of the act in question, and supposed it to be for the public interest to insist that the road should pass along the line prescribed in that law, or the company be compelled to pay the million of dollars, according to the construction now contended for, the commissioners or the county might have counteracted the wishes of the state, and, by releasing the company from the obligation to pay this money, allowed them to locate the road upon any other line. And if the construction of the plaintiff in error be right, the legislature of Maryland, in a case where the whole people of the state had become so deeply concerned by the large amount subscribed to the capital stock of the road, that its success or failure must seriously affect the interests of every part of the state; and where the improvement was regarded as of the highest importance to its general commercial prosperity; it deliberately deprived itself of the power of exercising any future control over it, and left it to a single county or county corporation to decide upon the course of the road, and either to

insist on the line prescribed by the legislature, or to release the company from the obligation to pursue it, without regard to the wishes or interest of the rest of the state. Whether the million of dollars was reserved by contract, or inflicted as a penalty, such a construction of the law cannot be maintained.

But we think it very clear that this was a penalty, to be inflicted if the railroad company did not follow the line pointed out in the law. It is true, that the act of 1835, which changed in some important particulars the obligations imposed by the original charter, would not have been binding on the *552] company without its consent; and the 1st section, therefore, contains a provision requiring the *consent of the company in order to give it validity. And when the company assented to the proposed alterations in their charter, and agreed to accept the law, it undoubtedly became a contract between it and the state; but it was a contract in no other sense than every charter, whether original or supplementary, is a contract, where rights of private property are acquired under it. Yet, although this supplementary charter was a contract in this sense of the term, it does not by any means follow that the legislature might not, in the charter, impose duties and obligations upon the company, and inflict penalties and forfeitures as a punishment for its disobedience, which might be enforced against it in the form of criminal proceedings, and as the punishment of an offence against the law. Such penal provisions are to be found in many charters, and we are not aware of any case in which they have been held to be mere matters of contract. And in the case before the court, the language of the law requiring the company to locate the road so as to pass through the places therein mentioned, is certainly not the language of contract, but is evidently mandatory, and in the exercise of legislative power; and it is made the duty of the company, in case they assent to the provisions of that law, to pass through Cumberland, Hagerstown, and Boonsborough; and if they fail to do so, the fine of $1,000,000 is imposed as a punishment for the offence. And a provision, as in this case, that the party shall forfeit a particular sum, in case he does not perform an act required by law, has always, in the construction of statutes, been regarded not as a contract with the delinquent party, but as the punishment for an offence. Undoubtedly, in the case of individuals, the word forfeit is construed to be the language of contract, because contract is the only mode in which one person can become liable to pay a penalty to another for a breach of duty, or the failure to perform an obligation. In legislative proceedings,

however, the construction is otherwise, and a forfeiture is always to be regarded as a punishment inflicted for a violation of some duty enjoined upon the party by law; and such, very clearly, is the meaning of the word in the act in question.

In this aspect of the case, and upon this construction of the act of Assembly, we do not understand that the right of the state to release it is disputed. Certainly the power to do so is too well settled to admit of controversy. The repeal of the law imposing the penalty, is of itself a remission. 1 Cranch, 104; 5 Id., 281; 6 Id., 203, 329. And in the case of the *United States* v. *Morris*, 10 Wheat., 287, this court held, that Congress had clearly the power to authorize the Secretary of the Treasury to remit any penalty or forfeiture incurred by the breach of the revenue laws, either before or after judgment; and if remitted before the money was actually paid, it embraced the shares given by law in such cases to the officers of the customs, as well as the share of the United States. The right to remit a penalty like this stands upon the same principles.

*We are, therefore, of opinion, that the law of 1840, [*553 hereinbefore mentioned, did not impair the obligation of a contract, and that the judgment of the Court of Appeals of Maryland must be affirmed.

JAMES STIMPSON, PLAINTIFF IN ERROR, *v.* WEST CHESTER RAILROAD COMPANY.

The 38th rule of court forbids the insertion of the whole of the charge of the court to the jury in a general bill of exceptions, but requires that the part excepted to shall be specifically set out.[1]

This court has not the power to correct any errors or omissions which may have been made in the Circuit Court in framing the exception; nor can it regard any part of the charge as the subject-matter of revision, unless the judges, or one of them, certify under his seal, that it was excepted to at the trial.

If the omission of a part of the charge, which was in fact embraced in the exception, is a mere clerical error, the party will be entitled to a *certiorari*, upon producing a copy of the exception, properly certified.

But in no case can the exception certified under the seals of the judges of the Circuit Court be altered or amended.[2]

A SUGGESTION was made, in this case, of diminution in the record, and a motion for a *certiorari* to bring up the charge

[1] CITED. *United States* v. *Morgan*, 11 How., 158.

[2] CITED. *Bridges* v. *Kuykendall*, 58 Miss., 828.

which the court delivered to the jury on the trial of the cause in the Circuit Court of the United States for the Eastern District of Pennsylvania.

Mr. Chief Justice TANEY delivered the following opinion of the court.

The plaintiff in error in this case suggests that there is diminution in the record, in omitting the charge to the jury which was delivered at the trial by the Circuit Court, and moves for a *certiorari*, that it may be set out at length, and appended to the record.

So much of the charge of the court as was excepted to at the trial, is inserted in the record as it now stands; and by the 88th rule of this court, adopted at January Term, 1832, it was ordered, that thereafter "the judges of the Circuit and District Courts do not allow any bill of exceptions, which shall contain the charge of the court at large to the jury, in trials at common law, upon any general exception to the whole of such charge. But that the party excepting be required to state distinctly the several matters in law, in such charge, to which he excepts; and that such matters of law, and those only, be inserted in the bill of exceptions, and allowed by the court."

The record now before us contains as much of the charge as is authorized, by this rule, to be inserted in the exception, and the motion for a *certiorari* must therefore be overruled.

*554] *J. R. *Ingersoll* afterwards filed, and read in open court, the following suggestion in writing, to wit:

In the printed record, a mere omission is made of a portion of the manuscript charge. 1. After the reference to *Evans* v. *Jordan*, 9 Cranch, 201, (printed record, p. 30, near the bottom of the page,) there are four and a half pages of manuscript, (pages 26, 27, 28, 29, 30.) 2. On page 27 of the manuscript are these words: "It thus appears that the act of 1839 goes only one step beyond those of 1832 and 1836, and is a dead letter, if it protects the person who has purchased, constructed, or used the machine invented," &c.

A memorandum endorsed by Judge Baldwin, "*Stimpson* v. *West Chester Railroad Company*. Exceptions to the charge." In this memorandum are found the following words: "7 sect. act of 1839 goes only one step beyond those of 1832 and 1836, and is dead letter so far as protection against such subsequent use."

3. On page 30 of the manuscript charge are these words: "In the case before us, it clearly appears that the defendants

constructed their railroad with the plaintiff's curves, in 1834, one year or more before the plaintiff's application for his renewed patent, consequently they may continue its use without liability to the plaintiff."

The same memorandum, endorsed by Judge Baldwin, contains these words: "As defendants made railroad in 1834, they may continue use."

Thus it will be perceived, the very points objected to in writing, and the writing received and admitted to be such by Judge Baldwin, are omitted in copying the charge at the clerk's office at Philadelphia. The language of the charge, as written out, is somewhat more extended than that of a memorandum hastily made while it was delivered, but it is, throughout, substantially, and in part, literally the same.

The "important question" in the case was, the defendants' right to use, after the date of the second patent, the specific machine constructed and used by them before the date of that patent. This question, according to the printed record, is not decided at all, nor left to the jury, nor any result arrived at in regard to it.

The whole charge is not wanted, but only those parts distinctly excepted to at the moment, and inadvertently omitted by a copyist.

It is obvious, besides, that the charge, or the fragment of a charge printed, is not only elliptical, but insensible. The judge says, (p. 30,) "Another important question," &c., yet no question appears. The manuscript must be consulted in order to give meaning or object to the phrase.

The counsel for the defendant in error would probably learn with some surprise, that this application has been refused. In the paper book which that counsel has caused to be printed, page 3, third paragraph, the 7th section of the act of 1839 is quoted, and supported *by points and references. [*555
All this is without object or origin in the printed record. The source of it is dried up by the omission of the copyist. So page 4 of that paper book, No. 6, "under the act of 1839, &c." These remarks are applicable only to the omitted parts of the charge.

The counsel for plaintiff in error, who now moves for a *certiorari*, was not present at the trial, but his colleague, who tried the cause, informs him that the judge undertook to put the whole charge on the record, and the concluding words along with it. Thus,

1. The whole charge, under the promise of the judge, ought to be a part of the record.

2. The omitted parts in the printed record are the essence

and substance of the case, admitted by the judge to be such, and specifically excepted to at the moment.

3. The whole difficulty arises from a mere inadvertence of a clerk.

4. Extreme injustice will be done, if the clerical omission be not corrected.

5. Were the judge living, verbal explanations might be given by him, but not more precise perhaps than the written endorsement or the memorandum of counsel.

Finally, the printed record shows that the judge put the case on two points:—

First, was the second patent void?

The judge decided that it is.

Secondly, if the second patent were not void, then, can the plaintiff recover, when the specific machine used by the defendants was first made and used by them before the second patent was taken out?

This second point, according to the printed record, the judge states, but does not decide, or put in such shape as to let the jury decide. His conclusion is omitted, while his premises are stated. And a correction of this is the subject of the *certiorari*. Mr. *Ingersoll* then moved the court for a writ of *certiorari* to be directed to the judges of the Circuit Court of the United States for the eastern district of Pennsylvania, commanding them to certify forthwith whatever errors and omissions shall be found.

Upon which motion, Mr. Chief Justice TANEY delivered the opinion of the court.

A motion was made at a former day of the present term for a *certiorari* to bring up the charge delivered by the Circuit Court at the trial, to be set out at length, and appended to the record. This motion was overruled for the reason then stated by the court.

The motion has since been revived, and a copy of what purports to have been the charge of the court at length has been
*556] produced, in order to show that a material point in it has not been inserted in the *exception, as brought up in the record; and some memorandums in the handwriting of the late presiding judge of the Circuit Court have also been laid before this court for the purpose of showing that an exception was reserved to the part of the charge above referred to.

In relation to the exception stated in the record, the court think it proper to say, that it contains a great deal of argument which is altogether out of place in an exception, and contrary to the directions of this court as given in the 38th

rule. And it would appear, from the copy of the charge produced in support of this motion, that while much of the argument of the Circuit Court has been improperly inserted, the matter of law which the argument was intended to prove, and upon which the jury were instructed, is omitted. But this court has not the power to correct any errors or omissions that may have been made in the Circuit Court in framing the exception; nor can we regard any part of the charge as the subject-matter of revision here, unless the judges, or one of them, certify, under his seal, that it was excepted to at the trial. If the portion of the charge, in relation to which the diminution is suggested, was in fact embraced in the exception, and the omission of it is a clerical error, then, upon producing here a copy of the exception properly certified, the plaintiff in error will be entitled to a *certiorari*, in order to supply the defect. But we can in no respect alter or amend the exception certified under the seals of the judges of the Circuit Court, either by referring to the charge at length, or the notes of the presiding judge; and as the case is now presented, the motion must be refused.

THE UNITED STATES, PLAINTIFFS, *v.* WILLIAM H. FREEMAN.

Statutes *in pari materia* should be taken into consideration in construing a law.

If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute.[1]

And if it can be gathered from a subsequent statute *in pari materia* what meaning the legislature attached to the words of a former statute, this will amount

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[1] CITED. *Simpkins* v. *Ward*, 45 Mich., 564.

It has been said that "Statutes are *in pari materia*, which relate to the same person or thing, or to the same class of persons or things. The word *par* must not be confounded with the term *similis*. It is used in opposition to it, as in the expression '*magis pares sunt quam similes*;' intimating not likeness, but identity. It is a phrase applicable to the public statutes or general laws, made at different times, and in reference to the same subject. Thus, the *English* laws concerning paupers, and their bankrupt acts, are construed together, as if they were one statute, and as forming a united system; otherwise the system might, and probably would, be unharmonious and inconsistent. Such laws are *in pari materia*. But private acts of the legislature, conferring distinct rights on different individuals, which never can be considered as being one statute, or the parts of a general system, are not to be interpreted, by a mutual reference to each other. As well might a contract between two persons be construed by the terms of another contract between different persons." *United Society* v. *Eagle Bank*, 7 Conn., 456, 469; *President, &c., of Waterford* v. *Whitehall Turnpike Co.*, 9 Barb. (N. Y.), 161, 169. Consequently all parts, *Adams* v. *Woods*, 2 Cranch, 336, 341; *Albrecht* v. *State*, 8 Tex. App., 313; *Commonwealth* v. *Robertson*, 5 Cush. (Mass.), 438; *Van Riper* v. *Essex Public Road*, 9 Vr. (N. J.), 23; *Magruder* v. *Carroll*, 4 Md., 335; *In re Murphy*, 3 Zab. (N. J.), 180; *Torrance* v. *McDougald*, 12 Ga., 526; *Brown* v. *Wright*, 1 Gr.

to a legislative declaration of its meaning, and will govern the construction of the first statute.[2]

The meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed; the limitation of the rule being that to extend the meaning to any case, not included within the words, the case must be shown to come within the same reason upon which the law-maker proceeded, and not a like reason.[3]

A brevet field-officer of the marine corps is not entitled by law to brevet pay and rations, by reason of his commanding a separate post or station, if the force under his command would not entitle a brevet field-officer of infantry of a similar grade to brevet pay and rations.

*557] *The act of 1834, chap. 132, does not repeal the 1st section of the act of 1818, regulating the pay and emoluments of brevet officers.

The 5th section of the act of 30th June, 1834, is a repeal of the joint resolution of the two houses of Congress of the 25th May, 1832, respecting the pay and emoluments of the marine corps.

By force of the army regulation No. 1125, authorizing the issues of double rations to officers commanding departments, posts, and arsenals, a brevet field-officer of marines is entitled to double rations. But the fact must be shown that he had such a command of a post or arsenal at which double rations had been allowed according to the army regulations.

(N. J.), 240; *Ogden* v. *Strong*, 2 Paine, 584; as well as all acts, *People* v. *Weston*, 3 Neb., 312; *State* v. *Stewart*, 47 Mo., 382; *Le Roy* v. *Chabolla*, 2 Abb. U. S., 448, even though passed at different times or expired, *Coleman* v. *Davidson Academy*, Cooke (Tenn.), 258; *Rex* v. *Loxdale*, 1 Burr., 445, 447; or repealed, *Bank for Savings* v. *The Collector*, 3 Wall, 495; *Church* v. *Crocker*, 3 Mass., 17, and also the entire system of laws, *State* v. *Jackson*, 36 Ohio St., 281; *McDougald* v. *Dougherty*, 14 Ga., 674; *Kansas Pacific Ry. Co.* v. *Wyandotte*, 16 Kan., 587; as well as the common law, *Harberti case*, 3 Co. 11 *b*, 13 *b*; *Lane* v. *Colton*, 14 Mod., 472, 486; *Hathaway* v. *Johnson*, 55 N. Y., 93; *Dorrity* v. *Rapp*, 72 Id., 307; *Armstrong* v. *Cooley*, 5 Gilm. (Ill.), 509; *United States* v. *Vose*, 1 Cranch C. C., 102, touching the same matter, must be taken together, *Duck* v. *Addington*, 4 T. R., 447; *Ex parte Drydon*, 5 Id., 417; *Berry* v. *State*, 10 Tex. App., 315; *Hayes* v. *Hanson*, 12 N. H., 284; *Goodrich* v. *Russell*, 42 N. Y., 177; *Goddard* v. *Boston*, 20 Pick. (Mass.), 407; *White* v. *Johnson*, 23 Miss., 68; *State* v. *Wilbor*, 1 R. I., 199; *Howlett* v. *State*, 5 Yerg. (Tenn.), 144; *Wilde* v. *Commonwealth*, 2 Metc. (Mass.), 408; *State* v. *Baldwin*, 2 Bail. (S. C.), 541; *The Harriet*, 1 Story, 251; *De Ormas' case*, 10 Mart. (La.), 158, 172; *Strode* v. *The Safford Justices*, 1 Brock., 162.

[2] See *Noble* v. *State*, 1 Greene (Iowa), 325; *Philadelphia &c. R. R. Co.* v. *Catawissa R. R. Co.*, 53 Pa. St., 20; *Byrd* v. *State*, 57 Miss., 243; *United States* v. *Gilmore*, 8 Wall, 330. A legislative interpretation has not the effect that a decision of the highest court authorized to construe a statute has. *Dunbar* v. *Roxburghe*, 3 Cl. & F., 335; *Aiken* v. *Western R. R. Co.*, 20 N. Y., 370.

[3] CITED. *United States* v. *Babbit*, 1 Black, 61; *Stewart* v. *Kahn*, 11 Wall, 504; *Atkins* v. *Disintegrating Co.*, 18 Id., 301; *Telegraph Co.* v. *Eyser*, 19 Id., 427; *Dickson* v. *District of Columbia*, 18 Ct. of Cl., 646.

In *Maxwell* v. *Collins*, 8 Ind., 88, it is said that, "It is a settled rule of interpretation of statutes, that the application of the words of a single statute may be enlarged or restrained to bring the operation of the act within the intention of the legislature, when violence will not be done by such interpretation to the language of the statute." *Murphy* v. *Barlow*, 5 Ind., 230. Such a statute is one giving a right of appeal. *Pearson* v. *Lovejoy*, 53 Barb. (N. Y.), 407; *Converse* v. *Burrows*, 2 Minn., 229; or allowing a redemption from a tax sale, *Jones* v. *Collins*, 16 Wis., 594; or providing for an arbitration of dispute, *Tuskaloosa Bridge* v. *Jennison*, 33 Ala., 476; or any remedial statute, *Cullerton* v. *Mead*, 22 Cal., 95; *Jackson* v. *Warren*, 32 Ill., 331; *White* v. *Steam-Tug Mary Ann*, 6 Cal., 462; *Hudler* v. *Golden*, 36 N. Y., 446; or one to promote public convenience, *Marshall* v. *Vultee*, 1 E. D. Smith (N. Y.), 294.

The fact of appropriations having been made by Congress for double rations does not determine what officers are entitled to them.[4]

A brevet field-officer of the marine corps, commanding a separate post, without a command equal to his brevet rank, is not entitled to brevet pay and emoluments. But if such brevet officer is a captain in the line of his corps, and in the actual command of a company, whether he is in the command of a post or not, he is entitled to the compensation given by the 2d section of the act of the 2d March, 1827.

THIS case came up on a certificate of division, from the Circuit Court of the United States for the district of Massachusetts. It was to test the right of the defendant in error, who was also the defendant below, to certain pay, allowances, and emoluments, which he claimed, as being an officer of the marine corps. The questions which were certified to this court were the following:—

"1. Whether a brevet field-officer of the marine corps is by law entitled to receive the pay and rations of his brevet rank by reason of his commanding a separate post or station, although the force under his command should not be such as would by law, or by such regulations as have in this respect and for the time the force of law, entitle a brevet field-officer of infantry of a similar grade to brevet pay and rations?

"2. Whether the provision respecting brevet pay and rations in the third section of the act of 1818, chap. 117, is repealed by the act of 1834, chap. 132?

"3. Whether by force of the act of 1834, chap. 132, the joint resolution of the two houses of Congress of the 25th of May, 1832, respecting the pay and emoluments of the marine corps, is repealed?

"4. Whether by force of the army regulation, numbered 1125, authorizing the issues of double rations to officers commanding departments, posts, and arsenals, a brevet field-officer of marines, commanding a separate post or station, is entitled to double rations?

"5. Whether the additional fact of appropriations having been made by Congress for such double rations, entitles such marine officer to receive the same for the years for which such appropriations are made?

"6. Whether a brevet field-officer of the marine corps, commanding a separate post, and receiving his brevet pay and emoluments, but being a captain in the line, is entitled [*558 to the ten dollars *a month additional compensation for responsibility of clothing, &c., under the act of 1834, chap. , applying to the marine corps the act of 1827, chap. 199?"

[4] As to appropriations, see *Riggs* v. *Pfister*, 21 Ala., 469; *Kins'y* v. *Sherman*, 46 Iowa, 465; *Crozier* v. *State*, 2 Sneed, (Tenn.), 410; *State* v. *Bishop*, 41 Mo., 16; *Pierpont* v. *Crouch*, 10 Cal., 315.

There was a statement of facts agreed upon in the court below, the only parts of which that bear upon the certified questions are the following:—

"It is further agreed that Colonel Freeman was commissioned a captain in the line of the marine corps on the 17th of July, 1821, and on that lineal rank he was commissioned a lieutenant-colonel by brevet on the 17th of July, 1831, and on the 30th of June, 1834, he was commissioned a major in the line of the marine corps.

"Colonel Freeman files an account, in set-off against the United States, of $1,013.93, for brevet pay and rations while in command on the Boston station, the same being a separate station or detachment, under the provision of the 3d section of an act of Congress of 16th April, 1814, for the augmentation of the marine corps. Said amount extends from the 30th of June, 1834, to the 1st of April, 1842, and has been presented to and disallowed by the fourth auditor.

"Said Freeman files an account also of $1,669 for double rations while in command on the Boston station, between the 30th of June, 1834, and the 1st of April, 1842, under a joint resolution of Congress of 25th May, 1832; which account has also been presented to and disallowed by the fourth auditor.

"Said Freeman files also an account of $354.69 for the responsibilities of clothing, &c., while a captain in the line of the marine corps, and in command of the marines on the Boston station, from the 17th of July, 1831, to the 30th of June, 1834, under an act of Congress of 30th June, 1834, making certain allowances, &c., to the captains and subalterns of the marine corps, as to officers of similar grades in the army, under an act of 2d March, 1827; which account has likewise been presented to and disallowed by the fourth auditor of the Treasury, on the ground that the defendant received the pay of a grade higher than that of captain.

"It is further agreed that double rations have been paid heretofore and up to the 30th of June, 1834, to the officers of the marine corps, in the manner and as stated in the letter of the fourth auditor of date 27th of April, 1842, and marked B, and annexed; also, that estimates and appropriations were made, as stated in said letter, since 1834.

"Upon the foregoing facts, the case is submitted to the court; the accounts of the said several claims of the said Freeman to be adjusted hereafter by the officers of the Treasury, if the same, or any portion of them, are found by the court to be legally due.

"FRANKLIN DEXTER, U. S. Dis. Att'y.
"W. H. FREEMAN."

*The laws will be stated which bear upon each of the three items into which the account is divided, viz.: 1, Pay; 2, Rations; 3, Clothing.

1. As to pay.

On the 6th of July, 1812, (2 Story, 1278,) Congress passed an "Act entitled an act making further provision for the army of the United States, and for other purposes," the 4th section of which was as follows:—

"That the President is hereby authorized to confer brevet rank on such officers of the army as shall distinguish themselves by gallant actions, or meritorious conduct, or who shall have served ten years in any one grade: Provided, That nothing herein contained shall be so construed as to entitle officers so breveted to any additional pay or emoluments, except when commanding separate posts, districts, or detachments, when they shall be entitled to and receive the same pay and emoluments to which officers of the same grade are now, or hereafter may be, allowed by law."

On the 16th of April, 1814, Congress passed an act (2 Story, 1414,) "authorizing an augmentation of the marine corps and for other purposes," the 3d section of which was exactly similar to the above, except that "officers of the marine corps" were substituted for "officers of the army," and that in the proviso the words "commanding separate stations or detachments" were substituted for "commanding separate posts, districts, or detachments."

On the 16th of April, 1818, an act was passed (3 Story, 1672,) "regulating the pay and emoluments of brevet officers," the 1st section of which was as follows:

"Be it enacted, &c., That the officers of the army who have brevet commissions shall be entitled to, and receive, the pay and emoluments of their brevet rank when on duty and having a command according to their brevet rank, and at no other time."

In 1825, regulations for the army were issued; the 1124th section was as follows:

"Brevet officers shall receive the pay and emoluments of their brevet commissions, when they exercise command equal to their brevet rank; for example—a brevet captain must command a company; a brevet major and a brevet lieutenant-colonel, a battalion; a brevet colonel, a regiment; a brevet brigadier-general, a brigade; a brevet major-general, a division."

On the 30th of June, 1834, Congress passed an act "for the better organization of the United States marine corps,"

(4 Story, 2383.) After increasing the number of officers and privates, the 5th section enacted:

"That the officers of the marine corps shall be entitled to, and receive, the same pay, emoluments, and allowances, as are now, or hereafter may be, allowed to officers of similar grades in the infantry of the army, except the adjutant and inspector, who shall," &c., &c.

*560] *The 7th section provided that "the commissions of the officers now in the marine corps shall not be vacated by this act," &c.

The 9th section repealed so much of the 4th section of the act of the 6th of July as authorized the President to confer brevet rank on such officers of the army or of the marine corps as shall have served ten years in any one grade.

The 10th section repealed all acts or parts of acts inconsistent therewith.

In 1836, another set of army regulations was issued, the forty-eighth article of which contained the following:

"Officers who have brevet commissions shall be entitled to receive their brevet pay and emoluments, when on duty, under the following circumstances:

"A brevet captain, when commanding a company.

"A brevet major, when commanding two companies, or when acting as major of the regiment.

"A brevet lieutenant-colonel, when commanding at least four companies, or when acting as lieutenant-colonel of the regiment.

"A brevet colonel, when commanding nine companies of artillery, or ten of infantry or dragoons, or a mixed corps of ten companies, or when commanding a regiment.

"A brevet brigadier-general, when commanding a brigade of not less than two regiments or twenty companies.

"A brevet major-general, when commanding a division of four regiments or at least forty companies.

"A brevet officer, when assigned by the special order of the secretary of war to a particular duty and command, according to his brevet rank, although such command be not in the line, provided his brevet allowances are recognised in the order of assignment.

"To entitle officers to brevet allowances while acting as field-officers of regiments according to their brevets, they must be recognised at general head-quarters as being on such duty, and the fact announced accordingly in general orders."

The laws relating to rations are the following:

2. Rations.

On the 8d of March, 1797, (1 Story, 460,) Congress passed

an act to amend and repeal, in part, the act entitled "An act to ascertain and fix the military establishment of the United States," the 4th section of which declared that "to each officer, while commanding a separate post, there shall be allowed twice the number of rations to which they would otherwise be entitled."

On the 16th of March, 1802, (2 Story, 831,) an act was passed "fixing the military peace establishment of the United States," the 5th section of which designated the number of rations to which each officer should be entitled, and then added as follows, viz.: "to the commanding officers of each separate post, such additional number of rations as the President of the United States shall, from time *to time, direct, having respect to the special circumstances of each post." [*561

On the 25th of May, 1832, (4 Story, 2333,) Congress passed a joint resolution as follows: "Resolved, &c., That the pay, subsistence, emoluments, and allowances of officers, non-commissioned officers, musicians, and privates of the United States marine corps, shall be the same as they were previously to the 1st of April, 1829, and shall so continue until they shall be altered by law."

In 1834, the act was passed which has already been mentioned under the head of "Pay."

3. Clothing.

On the 2d of March, 1827, Congress passed an act, (3 Story, 2057), the 2d section of which was as follows: That every officer in the actual command of a company in the army of the United States shall be entitled to receive $10 per month, additional pay, as "compensation for his duties and responsibilities, with respect to the clothing, arms, and accoutrements of the company, whilst he shall be in the actual command thereof."

Nelson, (attorney-general,) for the United States.

Colonel *Freeman*, (in a printed argument,) the defendant in the court below, for himself.

Nelson made the following points:

1st. That a brevet field-officer of the marine corps is not by law entitled to receive the pay and rations of his brevet rank, under the circumstances stated in this case.

2d. That the provision respecting brevet pay and rations, in the 3d section of the act of 1818, chap. 117, is repealed by the act of 1834, chap. 132.

3d. That the joint resolution of the two houses of Con-

gress, of the 25th of May, 1832, is repealed by the act of 1834, chap. 132.

4th. That a brevet field-officer of marines, commanding a separate post or station, is not entitled to double rations by force of Army Regulation, numbered 1125.

5th. That the additional fact of appropriations having been made by Congress for double rations, does not entitle such marine officer to receive the same, if otherwise not entitled thereto by law.

6th. That a brevet field-officer of marines is not entitled to the $10 a month, under the act of 1834, chap. 132, under the circumstances stated in the sixth question, certified in the record.

He examined the subjects in the order mentioned above, of Pay, Rations, and Clothing.

1. Pay.

He admitted that if the act of 1814 is still in force, the defendant is entitled to brevet pay; but it is not in force. The act of 1834 has changed the law; the 5th section puts the *562] marine corps on the same footing with the infantry. What, then, were the infantry entitled *to? To answer this question, we must look at the laws of 1812 and 1814, (the same in substance upon this point,) and also the law of the 16th April, 1818, which expressly declares that officers of the army shall receive brevet pay when they have a command according to their brevet rank, and at no other time. Before they can claim the pay, the condition must be shown to be complied with; but here it is admitted that Col. Freeman had not such a command.

The Army Regulations of 1825, reg. 1124, say that brevet officers are to receive pay only when the command is equal to the rank; and those of 1836 say the same. Freeman was a lieutenant-colonel by brevet, and had not the command appropriate to that rank.

Does the act of 1834 repeal that of 1814? We say it does. It purports to re-organize the marine corps; it makes great changes as to the officers and their rate of pay; and the 7th section provides that the commissions of the officers shall not be vacated. Why put in such a clause, unless there was a design to put the corps upon a new footing altogether? The 5th section changes the pay, emoluments, and allowances, and puts them on the footing of infantry; and the 10th section repeals all laws inconsistent with the act. The acts of 1818 and 1834 repealed all former laws, both as to infantry and marines.

2. Rations.

By the act of 1797, double rations were given to a commander of a separate post; but the act of 1802 changed this rule, and substituted another. Instead of giving them to every commander, the President was to designate the number of rations for each post, according to circumstances. This was a repeal of the act of 1797. They cannot both stand.

But it is said that the joint resolution of 1832 changed the rule, as to officers of marines, and rendered lawful the same pay, rations, &c., which they had, in fact, received before 1829. Suppose we admit this. That resolution looked to a future change, which was made by the act of 1834, which referred not only to pay, but allowances and emoluments. Infantry are not entitled to these allowances, and therefore the marines cannot be.

These considerations furnish answers to the three first certified questions.

With regard to the fourth, it may be said that the Army Regulations give double rations to such posts as the War Department shall authorize; but the act of 1802 says that the President is the person who is to give the authority; and supposing that the War Department represents the special authority of the President, then we say, that the Department never gave such authority for this post. The defendant must show that it did.

Besides, the regulation was not intended to apply to the marines. They were under the Navy Department.

*The 5th question is easily answered. If the defendant was not entitled to the allowances by law, [*563 he cannot claim them because Congress placed money in the hands of the executive, in case it should be wanted. The service might have been performed or it might not, and the money was ready in case it should be performed. But here it was not.

3. Clothing.

Ten dollars per month were to be given to commanders of companies. But Freeman was a major by commission, and lieutenant-colonel by brevet. The law only includes captains; and, moreover, the record does not show that there was a company of marines at Boston, and the fact, I believe, was not so.

Mr. Justice WAYNE delivered the opinion of the court.

Several questions occurred upon the trial of this cause in the court below, upon which the opinions of the judges were opposed, and they were certified to this court for decision.

From a careful examination of all the acts of Congress re-

lating to the pay and emoluments of brevet officers, and those acts establishing and organizing the marine corps, we are of the opinion, whatever may have been a different practice, that the brevet officers of the marine corps have always been by law upon the same footing with other officers of the military establishment of the United States, in respect to the circumstances which entitle them to pay and emoluments, and that they continue to be so. Brevet pay and emoluments were originally given by the act of 1812, (2 Story Laws, 1278,) and by the act of 1814, (2 Story Laws, 1414,) when breveted officers commanded separate posts, districts, stations, or detachments. But an act was passed in 1818, (3 Story Laws, 1672,) regulating the pay and emoluments of brevet officers, the 1st section of which is, that "the officers of the army who have brevet commissions, shall be entitled to and shall receive the pay and emoluments of their brevet rank, when on duty and having a command according to their brevet rank, and at no other time." The 2d section is, "that no brevet commission shall hereafter be conferred, but by and with the advice of the Senate." By the acts of 1812 and 1814, they were conferred by the President alone. By the 1st section of the act of 1818, it will be perceived that pay and emoluments were attached to command, and not, as they had been, to the command of separate posts, stations, districts, or detachments. That the act of 1818 repealed the 4th section of the act of 1812, no one doubts. But it is said, it is not a repeal of the 3d section of the act of 1814, because the act, in terms, speaks of the officers of the army who have brevet commissions, and not of such officers of the marine corps. It may be well to state, that the 3d section of the act of 1814 is a transcript of the 4th section of the act of 1812, except that it has in it the *564] words "officers of the marine corps," instead of "officers of the army;" and that the *words "stations or detachments" were substituted for "posts, districts, or detachments." The first point for consideration is, was the act of 1818 a repeal of the 4th section of the act of 1812, and of the 3d section of the act of 1814, as to the condition upon which brevet officers were to have additional pay and emoluments? It is conceded that it repealed the 4th section in the act of 1812. We are of opinion that it repealed also the 3d section of the act of 1814. It cannot be denied that the marine corps is an addition to the "military establishment of the United States." It is declared to be so in the act by which it was organized. Now, though neither that fact, nor the words "military establishment," as they are used in the acts of Congress, will of themselves authorize the inclusion of

officers of the marine corps, within the words "officers of the army," yet considering the subject-matter of the act of 1818; the application of the 2d section of the act to all breveted officers; and the assimilation of the marine corps, by the act of 1814, to the army, to give to its officers brevet commissions, and pay, exactly, too, in the same way as they were given to the officers of the army, by the act of 1812; we do not see how, consistently with a correct judicial interpretation, the conclusion can be resisted, that Congress did intend, in passing the act of 1818, to place the officers of the marine corps and the officers of the army upon the same footing, in respect to brevet pay and emoluments. Though what has been differently done is binding upon the government, and cannot be recalled, to the pecuniary disadvantage of any officer, who may have received brevet pay and emoluments, not according to the act of 1818, no erroneous practice under it, of however long standing, can justify the allowance of a claim, contested by the government, in a suit contrary to what is the true meaning and intent of that act.[1] The error of the accounting officers of the Treasury, and of the officers of the marine corps, in the construction of the act of 1818, arose from that act having been considered by itself, without any reference to other statutes relating to brevet commissions and pay, and without any examination whether the words "officers of the army," as used in the 1st section of the act of 1818, though they are descriptive of a particular class, were not intended, from their connection with the subject-matter of the act, to comprehend all officers of the military establishment of the United States, who, when the act was passed, were only under like circumstances entitled to brevet pay and emoluments.

The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law, that all acts *in pari materia* are to be taken together, as if they were one law. Doug., 30; 2 T. R., 387, 586; 4 Mau. & Sel., 210. If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute; [*565
Ld. Raym., 1028; and if it can be gathered from a *subsequent statute *in pari materia*, what meaning the legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute. *Morris* v. *Mellin*, 6 Barn. & C., 454; 7 Id., 99. Wherever any words of a statute are

[1] CITED. *Arthur* v. *United States*, 16 Ct. of Cl., 433.

doubtful or obscure, the intention of the legislature is to be resorted to, in order to find the meaning of the words. *Wimbish* v. *Tailbois*, Plowd., 57. A thing which is within the intention of the makers of the statute, is as much within the statute, as if it were within the letter. *Zouch* v. *Stowell*, Plowd., 366. These citations are but different illustrations of the rule, that the meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed—the limitation of the rule being, that to extend the meaning to any case not included in the words, the case must be shown to come within the same reason upon which the lawmaker proceeded, and not only within a like reason. This court has repeatedly, in effect, acted upon the rule, and there may be found, in the reports of its decisions, cases under it, like the cases which have been cited from the reports of the English courts. In 4 Dall., 14, "The intention of the legislature, when discovered, must prevail, any rule of construction declared by previous acts to the contrary notwithstanding." In 2 Cranch, 33, "A law is the best expositor of itself—that every part of an act is to be taken into view for the purpose of discovering the mind of the legislature," &c., &c. In the case of the *United States* v. *Fisher et al.*, *Assignees of Blight*, in the same book, the court said, "it is undoubtedly a well-established principle in the exposition of statutes, that every part is to be considered, and the intention of the legislature to be extracted from the whole," &c. In 2 Pet., 662, "A legislative act is to be interpreted according to the intention of the legislature, apparent upon its face. Every technical rule, as to the construction or force of particular terms, must yield to the clear expression of the paramount will of the legislature." In Paine, 11, "In doubtful cases, a court should compare all the parts of a statute, and different statutes *in pari materia*, to ascertain the intention of the legislature." So in 1 Brock., 162. In the construction of statutes, one part must be construed by another. In order to test the legislative intention, the whole statute must be inspected. No one of the cases cited will justify; nor have they been cited to sanction an equitable construction of statutes beyond the just application of adjudicated cases. They have been brought together upon this occasion, for the purpose of showing how many authorities there are to sustain the conclusion, that the act of 1818, regulating the pay and emoluments of brevet officers, repealed the act of 1814, upon which the defendant relies to support his claim to brevet pay. Our answer to the first question

*then is, that a brevet field-officer of the marine corps is not entitled, by law, to brevet pay and rations, by reason of his commanding a separate post or station, if the force under his command would not entitle a brevet field-officer of infantry, of a similar grade, to brevet pay and rations. We will add to our exposition of the law upon this point, that brevet officers of the marine corps, in respect to pay and emoluments, were included under the Army Regulation 1124, sanctioned on the 1st March, 1825; were included also, in the regulation upon the subject of brevet pay, sanctioned by the President, December 1, 1836, and that they may claim brevet pay and emoluments under the regulations of 1841, when they exercise a command, according to the provisions regulating brevet pay, in page 344, Army Regulations of 1841. This right to brevet pay results from the marine corps having been subjected, by the act of 1798, (1 Story Laws, 542,) and by other acts of Congress, to the same rules and articles of war "as are prescribed for the military establishment of the United States," and from the exception in the 2d section of the act of 30th June, 1834, taking them out of the regulations which might be established for the navy, when detached for service with the army, by order of the President of the United States.

To the second question we reply, that the act of 1834, ch. 132, does not repeal the first section of the act of 1818, regulating the pay and emoluments of brevet officers. That section of the act is still in force, and upon it rests the army regulations, in relation to brevet pay and emoluments. The act of 1834 only repeals those sections in the acts of 1812 and 1814, and in the act of 1818, by which the President was authorized to confer, and the Senate was permitted to confirm, brevet commissions conferred upon officers of the army, or officers of the marine corps, for ten years' service in any one grade, excepting such officers as had, before the passage of the act, acquired the right to have brevet rank conferred by ten years' service in any one grade, if the President should think fit to nominate them to the Senate for brevet commissions.

To the third question we reply, that the 5th section of the act of the 30th June, 1834, is a repeal of the joint resolution of the two houses of Congress of the 25th May, 1832, respecting the pay and emoluments of the marine corps.

The fourth question involves the charge made by the defendant for double rations. Additional rations are provided for by the 5th section of the act of 1802, (2 Story Laws, 831.) "To the commanding officer of each separate post, such additional number of rations as the President of the United States

shall, from time to time, direct, having respect to the special circumstances of each post," is the language of a part of the section. It is the authority for the 1125th paragraph in the Army Regulations of 1825. The President sanctioned
*567] those regulations, and by doing so, delegated his authority, *as he had a right to do, to the secretary at war. The Army Regulations, when sanctioned by the President, have the force of law, because it is done by him by the authority of law. The Regulations of 1825, then, were as conclusive upon the accounting officer of the Treasury, whilst they continued in force, as those of 1836 afterwards were, and as those of 1841 now are. When, then, an officer presents, with his account, an authentic document or certificate of his having commanded a post or arsenal, for which an order has been issued from the War Department, in conformity with the provisions of the Army Regulations, allowing double rations, his right to them is established, nor can they be withheld, without doing him a wrong, for which the law gives him a remedy. But as the question in this case must be decided upon the agreed statement of facts in the record, between Colonel Freeman and the District Attorney of the United States, we have no hesitation in answering it adversely from the claim of the defendant, for double rations, as the fact does not appear in the record that he had such a command of a post or arsenal, at which double rations had been allowed, according to the Army Regulations which were in force, from the time his account begins, or according to those subsequently sanctioned by the President. To the fifth question, we reply, that the fact of appropriations having been made by Congress for double rations, does not determine what officers in command are entitled to them. The sixth question relates to the charge of the defendant for compensation for his duties and responsibilities, "with respect to clothing, arms, and accoutrements," while he was a captain in the line of the marine corps, and in command of the marines on the Boston station. The question, as it is put, makes it necessary for us to repeat what has been already said in a previous part of this opinion, that a brevet field-officer of the marine corps, commanding a separate post, without a command equal to his brevet rank, is not entitled to brevet pay and emoluments. But if such brevet officer is a captain in the line of his corps, and in the actual command of a company, whether he is in command of a post or not, he is entitled to the compensation given by the 2d section of the act of the 2d March, 1827, (3 Story Laws, 2057.) We cannot give any other answer to this question, because the first part of it attaches brevet pay and emol-

uments to the command of a separate post, for which it is not allowed by law, and cannot therefore influence any right to compensation which may have accrued to a captain in the line under the 2d section of the act of the 2d March, 1827. That act is in full force, unrepealed in any way by the act of 1834, for the better organization of the marine corps. 4 Story, 2383. And captains and subalterns of that corps are as much entitled to its provisions, as any other captains or subalterns in the military establishment of the United States. If there was any doubt of this, before the act of 1834 was passed, the 5th section of that act must be considered [*568 *as having put an end to it. It is, "that the officers of the marine corps shall be entitled to, and receive the same pay, emoluments, and allowances, as are now, or may hereafter be allowed to similar grades in the infantry of the army," subject to the exception in the section following the words just cited.

We shall direct the foregoing answers to the questions, upon which the judges in the court below were opposed in opinion, to be certified to that court.

JAMES B. ANDREWS, APPELLANT, v. WILLIAM H. WALL AND JOHN H. GEIGER, DEFENDANTS.

An agreement of consortship between the masters of two vessels engaged in the business known by the name of wrecking, is a contract capable of being enforced in an admiralty court, against property or proceeds in the custody of the court.[1]

The case of *Ramsay* v. *Allegre*, 12 Wheat., 611, commented on, and explained.

Such an agreement extends to the owners and crews, and is not merely personal between the masters.

If made for an indefinite period, it does not expire with the mere removal of

[1] RECOGNIZED. *The Lottawanna*, 20 Wall., 223.

The extent of the admiralty jurisdiction is examined in *Kellum* v. *Emerson*, 2 Curt., 79, and declared not to extend over a libel which asserts an equitable title to one fourth of a vessel, and claims a discount of its earnings, and of the proceeds of its sale, although part owners sailed the vessel, and the libellant worked, as a carpenter, on board; nor to take an account between part owners. *The Larch*, 2 Curt., 427, 434; *The Marengo*, 1 Low., 52; nor will the court take cognizance to deliver possession of the vessel to the libellants. *Hill* v. *The Yacht Amelia*, 6 Ben., 475; see also *Reppert* v. *Robinson*, Taney, 492; *Proceeds of the Lady Franklin*, 2 Biss., 121; *The Eclipse*, Id., 99; *United States* v. *Mackey*, 2 Dill., 299; *Vandewater* v. *The Yankee Blade*, 1 McAll., 9; *The Richard Busteed*, 1 Sprague, 441; *The Schooner Active*, Olc., 286; *The Ship Panama*, Id., 343; *In re Ship Edith*, 5 Ben., 432; *The Ship Sailor Prince*, 1 Id., 461; *The St. Joseph*, Bro. Adm., 202.

one of the masters from his vessel, but continues until dissolved upon due notice to the adverse party.

Where there is no other evidence than the answer of its having been a part of the original agreement, that such removal should dissolve the contract, the evidence is not sufficient.

Whenever proceeds are rightfully in the possession and custody of the admiralty, it is an inherent incident to the jurisdiction of that court to entertain supplemental suits by the parties in interest to ascertain to whom those proceeds rightfully belong, and to deliver them over to the parties who establish the lawful ownership thereof.

THIS was an appeal from the Court of Appeals in Florida, and grew out of the following circumstances:

There were two vessels, one called the Globe, and the other the George Washington, engaged in the business of assisting vessels which were wrecked, or in danger of becoming so, on the coast of Florida. Between these two there existed the agreement of consortship, which will be spoken of presently.

For assistance rendered by the Globe to the ship Mississippi and cargo, an amount of $5522.49 was decreed as salvage. Andrews, the appellant, was part owner of the Globe, and Wall and Geiger, the defendants in error, were part owners of the George Washington.

Wall and Geiger filed a petition in the Superior Court for the southern district of Florida, (being the same court which decreed the salvage,) as follows:

*569] * "To the Honorable WM. MARVIN, Judge of the United States Superior Court, southern judicial district of Florida, in admiralty.

"Your petitioners respectfully represent, on oath, to your honor, that they, with J. A. Thouron, are the only owners of the schooner George Washington; that said schooner has for some time past been consorted with the sloop Globe, in the business of wrecking upon this reef, and was so consorted with said sloop when that vessel performed the services to the ship Mississippi, which have resulted in the payment of salvage to said sloop by your honor, in admiralty, on the 31st day of May, 1841; that a portion of said salvage is justly due and owing unto your petitioners from said consortship, and that the master and agent of said sloop Globe, J. B. Andrews, positively refuses to pay to them any portion of the same. They therefore respectfully represent this matter, and pray the interference of your honor, that you may order the clerk of your honor's court to retain such portion of said salvage, now about to be paid to said sloop, as to your honor may appear equitable under said consortship, due to said petitioners as owners of schooner the George Washington. And

they are ready to show to your honor the exact sum due to them under said consortship. And will ever pray.

W. H. WALL,
JOHN H. GEIGER,
S. R. MALLORY, Proctor."

In conformity with this petition the judge directed the sum of $2,455.64 to be retained, which Wall and Geiger claimed by a subsequent petition.

Andrews answered it as follows:—

"The answer of James B. Andrews, part owner of the sloop Globe, would respectfully represent, that a notice of a petition filed by Wm. H. Wall and John H. Geiger, who claim as part owners of the schooner George Washington, claiming a part of the salvage decreed to Thomas Greene, master of the sloop Globe, in the case of *Thomas Greene et al.* v. *Ship Mississippi and cargo*, and has been served upon him. To which he comes into court, and says, that—

"1. The petitioners have no right to come into your honorable court in this summary way, and obtain a decree against the earnings of the master and crew of the sloop Globe, who were libellants in the above case.

"2. That if there is anything due by the Globe, her crew and owners, it must be by some contract existing at the time the services for which salvage has been decreed were rendered, and that if such contract exists, it was not made with petitioners by your respondent.

"3. Your respondent admits that there was a consortship or agreement entered into previously to the services rendered to the ship Mississippi, by him, as master of the sloop Globe, and ——— Russel, master of the schooner George Washington, by which they *agreed to divide their respective earnings or gain between each other, their crews, and the [*570 owners of the respective vessels, in a certain proportion, viz.: the Globe was to be rated at sixty-three tons, and the George Washington at fifty-three tons, and the number of men each vessel might have on board at the time that any money might be earned. But he alleges that such contract was made between him and Captain Russel for an indefinite time, and considered that it only remained in force so long as they both remained on board of their respective vessels and earned salvage; and that at the time the money in dispute was earned, that Thomas Greene, the mate of the Globe, was master, and in that capacity rendered services to the ship Mississippi, and filed a libel in his own name, as such, and

being recognized as master by this court, salvage on the said ship was decreed to him in his own name.

"Whereupon your respondent prays that your honor will dismiss the said petition, and that the amount of the money retained from the salvage decreed to Thomas Greene be paid over to him, together with his costs in this behalf expended. And your respondent, &c.

JAMES B. ANDREWS,
W. R. HACKLEY, Proct. for Resp."

After the cause had been argued, the court gave the following order:—

"Ordered, That the clerk ascertain the number of men on board the sloops Globe and George Washington respectively at the time of the earning of the salvage by the Globe for services rendered the Mississippi and cargo, and that he divide the salvage in that case decreed the Globe, between the Globe and the George Washington, man for man, and ton for ton, taking the Globe at sixty-three tons, and the George Washington at fifty-three tons, and that he pay to Wm. H. Wall and John H. Geiger the George Washington's portion for and on behalf of all persons interested therein.

"Ordered, That each party pay his own costs in this suit."

The result of the order was an apportionment of the fund between the two vessels as follows:—

To the Globe, - - - - - -	$3,066 85
To the George Washington, - - -	2,455 64
Total salvage, - - - - -	$5,522 49

From this decree Andrews appealed to the Court of Appeals of Florida, which affirmed the sentence, and from this affirmance he appealed to this court.

Clement Cox, for the appellant.
C. J. Ingersoll, for the defendants.

Cox made the two following points:—

1. That the record shows no subsisting contract of consortship at the time of the salvage service.

*571] *2. That a court of admiralty has no jurisdiction of the case.

In support of the first point, he said, that he had not been able to find any judicial exposition of the contract of consortship. The court below decided on two grounds: 1st. That

the Globe was a wrecker, and, 2d. That contracts of consortship were usual. But the record shows no evidence of these facts, and the court was not warranted in assuming them. 8 Gill & J. (Md.), 449, 456.

Upon the second point, he said that he had not found a case where a court of admiralty had taken such jurisdiction, and it ought not to have been assumed. 12 Wheat., 611, 618; 3 Pet., 433; Baldw., 544; Bee, 199; 1 Pet. Adm., 223; Gilp., 514, 184; Dunlap Adm. Pr., 29; 1 Hagg., 306; 13 Pet., 175.

C. J. Ingersoll, for defendants, said, that he could scarcely add anything to the reasoning upon which the court below founded its opinion, which was inserted in the record. The contract was one of an admiralty character, and the case was like that of joint captors, the rules relating to which were familiar to the court. It was a daily practice in a court of admiralty to distribute funds which were brought into court. The answer itself admitted the contract.

Mr. Justice STORY delivered the opinion of the court.

This is the case of an appeal in admiralty, from a decree of the Court of Appeals of the territory of Florida, affirming the decree of the judge of the Superior Court of the southern judicial district of Florida. It appears from the proceedings, that upon a libel filed in the Superior Court of the territory, in behalf of the owners and crew of the sloop Globe, salvage had been awarded in their favor, against the ship Mississippi; that a part of the salvage so decreed remained in the registry of the court; and that the present petition was filed by Wall and Geiger, on behalf of the owners of the schooner George Washington, for the share of the salvage due to them, as consorting with the Globe in the business of salvage. It seems to be a not uncommon course among the owners of a certain class of vessels, commonly called Wreckers, on the Florida coast, with a view to prevent mischievous competitions and collisions in the performance of salvage services on that coast, to enter into stipulations with each other, that the vessels owned by them respectively shall act as consorts with each other in salvage services, and share mutually with each other in the moneys awarded as salvage, whether earned by one vessel or by both. It is admitted in the answer of the appellant, who was the master and part owner of the Globe, and the original respondent in the court below, that such an agreement or stipulation was entered into, for an indefinite time, between himself, as the master of the Globe, and the master of the George Washington, before the salvage service in ques-

tion; but he insists that it was to remain in force only so long
*572] as both remained masters of their respective *vessels, and earned salvage; and that at the time of the salvage services in question, one Thomas Greene, mate of the Globe, acted as master thereof. He also insists, that the libellants have no right to come into the court, in a summary way, to obtain a share of the salvage; and lastly, he insists that the agreement or stipulation was not made between him and the libellants.

The courts below overruled all these matters of defence; and upon the present appeal the same are brought before us for consideration and decision. In the first place, then, as to the original agreement or stipulation for consortship, it must, although made by the masters of the vessels, be deemed to be made on behalf of the owners and crews, and to be obligatory on both sides, until formally dissolved by the owners. The mere change of the masters would not dissolve it, since in its nature it is not a contract for the personal benefit of themselves, or for any peculiar personal services. It falls precisely within the same rule, as to its obligatory force, as the contract of the master of a ship for seamen's wages, or for a charter-party for the voyage, which, if within the scope of his authority, binds the owner, and is not dissolved by the death or removal of the master. Besides, in the present case, the agreement or stipulation for consortship was for an indefinite period, and, consequently, could be broken up or dissolved only upon due notice to the adverse party; and the mere removal of the master of one of the vessels, by the owner thereof, for his own benefit or at his own option, could in no manner operate, without such notice, to the injury of the other. In the next place, there is not a particle of evidence in the case, that at the time of the agreement or stipulation for consortship, it was agreed between the parties, that a change of the masters should be treated as a dissolution thereof. The answer is not of itself evidence to establish such a fact, but it must be made out by due and suitable proofs; for in the admiralty the same rule does not prevail as in equity, that the answer to matters directly responsive to the allegations of the bill, is to be treated as sufficient proof of the facts, in favor of the respondent, unless overcome by the testimony of two witnesses, or of one witness and other circumstances of equivalent force. The answer may be evidence, but it is not conclusive; and in the present case, the dissolution of the agreement or stipulation for consortship, by the change of the master of the Globe, seems to be relied on as a

mere matter of law, and not as a positive ingredient in the original contract.

The material and important question, therefore, is, whether the agreement or stipulation of consortship is a contract capable of being enforced in the admiralty against property or proceeds in the custody of the court? We are of opinion that it is a case within the jurisdiction of the court. It is a maritime contract for services to be rendered on the sea, and an apportionment of the salvage earned therein. Over maritime contracts the admiralty possesses a clear and established *jurisdiction, capable of being enforced *in* [*573 *personam*, as well as *in rem;* as is familiarly seen in cases of mariners' wages, bottomry bonds, pilotage services, supplies by material men to foreign ships, and other cases of a kindred nature, which it is not necessary here to enumerate. The case of *Ramsay* v. *Allegre*, 12 Wheat., 611, contains no doctrine, sanctioned by the court, to the contrary. It is within my own personal knowledge, having been present at the decision thereof, that all the judges of the court, except one, at that time concurred in the opinion that the case was one of a maritime nature, within the jurisdiction of the admiralty, but that the claim was extinguished by a promissory note having been given for the amount, which note was still outstanding and unsurrendered. It became, therefore, unnecessary to decide the other point.[1] The general doctrine had been previously asserted in the case of *The General Smith*, 4 Wheat., 438, and it was subsequently fully recognized and acted upon by this court, in *Peroux* v. *Howard*, 7 Pet., 324. Upon general principles, therefore, there would be no difficulty in maintaining the present suit, as well founded in the jurisdiction of the admiralty.

There is another view of the matter, which does not displace but adds great weight to the preceding considerations. This is a case of proceeds rightfully in the possession and custody of the admiralty; and it would seem to be, and we are of opinion that it is, an inherent incident to the jurisdiction of that court, to entertain supplemental suits by the parties in interest, to ascertain to whom those proceeds rightfully belong, and to deliver them over to the parties who establish the lawful ownership thereof. This is familiarly known and exercised in cases of the sales of ships to satisfy claims for seamen's wages, for bottomry bonds, for salvage services, and for supplies of material-men, where, after satisfaction thereof, there remain what are technically called "remnants and surpluses," in the

[1] FOLLOWED. *Thomas* v. *Osborn*, 19 How., 88.

registry of the admiralty.[1] But a more striking example is that of supplemental libels and petitions, by persons asserting themselves to be joint captors, and entitled to share in prize proceeds, and of custom-house officers, for their distributive shares of the proceeds of property seized and condemned for breaches of the revenue laws, where the jurisdiction is habitually acted upon in all cases of difficulty or controversy.

Upon the whole, without going more at large into the subject, we are of opinion that the decree of the Court of Appeals of Florida ought to be affirmed, with costs.

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*574] *AUGUSTUS AND EDWARD BONNAFEE, PARTNERS UNDER THE NAME AND STYLE OF BONNAFEE & CO., PLAINTIFFS IN ERROR, *v.* IRA E. WILLIAMS, CHARLES S. SPANN AND B. H. COOK, DEFENDANTS IN ERROR.

The Circuit Court of the United States has jurisdiction where a promissory note is made by a citizen of one state payable to another citizen of the same state or bearer, and the party bringing the suit is a citizen of a different state; although upon the face of the note it was expressed to be for the use of persons residing in the state in which the maker and payee lived.[2]

Where the citizenship of the parties gives jurisdiction, and the legal right to sue is in the plaintiff, the court will not inquire into the residence of those who may have an equitable interest in the claim.[3]

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the southern district of Mississippi.

The plaintiffs in error were citizens of the state of New York; the defendants in error, of Mississippi.

The defendants in error executed four joint and several promissory notes, promising to pay to Cowles Mead or bearer, for the use of the Real Estate Banking Company of Hinds county, the sums of money therein mentioned.

In 1841, the plaintiffs brought suit upon these notes, alleging themselves to be the lawful bearers thereof.

The defendants demurred upon the two following grounds:

"1. The plaintiffs cannot maintain the action, because, by

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[1] FOLLOWED. *The Lottawanna*, 20 Wall, 223. See *Leland* v. *The Medora*, 1 Woodb. & M., 92, 114.

[2] CITED. *Phillips* v. *Preston*, 5 How., 291. See *White* v. *Vermont &c., R. R. Co.*, 21 How., 576.

This case is no longer the law except as to foreign bills of exchange. See U. S. Rev. Stat. (ed. 1878,) § 629.

[3] APPLIED. *Knapp* v. *Railroad Co.*, 20 Wall, 124.

their own showing, the defendants who are sued are also a part of the persons for whose use the suit is commenced.

"2. The court can have no jurisdiction of this case, because, although it is true, the nominal plaintiffs are the bearers of the paper sued on, and citizens of a state other than Mississippi, yet the usees, or those for whose benefit the suit is brought, for anything which appears in the declaration, are citizens of the state of Mississippi; and there are all other causes," &c.

The Circuit Court sustained the demurrer, from which decision a writ of error brought the case to this court.

The cause was argued for the plaintiffs in error, by Mr. *Walker*, as follows:

The first cause of demurrer was as follows: "The defendants who are sued are also a part of the persons for whose use the suit is brought."

Now, the suit is brought in the name of Bonnafee & Co. alone, and not for the use of any one, and therefore the demurrer cannot be sustained on this ground. The note was payable to "Cowles Meade, or bearer, for the use of the Real Estate Banking Company of Hinds county," and it was assigned by delivery, by Cowles Meade, to the plaintiffs, who, throughout every count of the declaration, are described as the lawful bearers of the note, and in whose *name [*575 alone the suit is brought. It is true, the note was payable to Cowles Meade, for the use of the Real Estate Banking Company, and that Cowles Meade was one of that Company; but this could constitute no objection to the jurisdiction, because, before a court of common law, this company had no rights whatever. They were unincorporated, and, therefore, could not sue at law in the name assumed by them; and even if they could, no right of action would accrue to them, where the note, as in this case, was not payable to them, but to Cowles Meade, or bearer, in whom alone, or the bearer, the sole legal title was vested. The question, therefore, intended to be raised by the demurrer, does not apply to this case. The legal title is vested in any bearer, and the fact that the bearer derived title by delivery, from Cowles Meade, can have no injurious effect upon the title of the plaintiffs.

But it is said that Cowles Meade, to whom, or bearer, the note is payable, appears to be one of the same unincorporated banking company for whose use the note is given. But if Cowles Meade delivered the note to the plaintiffs, and they, as is the fact, are not members of the same banking company, still the question does not arise, that one partner cannot sue

another partner at law; for the plaintiffs and defendants were not partners, and the use for which the note was given does not affect the legal rights of the parties. The legal intendment is, and such is the fact, that the plaintiffs, with the consent of the banking company, were the purchasers of the note in question, and brought the suit for their own use alone. But were it otherwise, could not Cowles Meade maintain a suit at law on such a note as this of the defendants, even if Meade and the defendants were members of the same banking company? Now, the law is clearly settled that a partnership can sue upon a note given by one of the partners to another, even although it be for the use of the firm. *Van Ness* v. *Forrest*, 8 Cranch, 30.

In that case, the person to whom the note was given was a mere trustee for the firm; yet the court maintained the action against one of the partners. The cases in which partners cannot sue each other, on account of transactions growing out of the partnership, or where the firm cannot sue a partner, are cases of unascertained balances, or where the partnership transaction has not been separated by a note or express promise. In such cases a court of law cannot sever the joint contract or liabilities, but this may be done by the parties themselves. *Neale* v. *Tuston*, 4 Bing., 149; *Coffee* v. *Brian*, 3 Id., 54; *Gibson* v. *Moore*, 3 N. H., 527; *Nevins* v. *Townsend*, 6 Conn., 5; Story Part., 241, 527, 320; Colly. Part., 392, 504, 91, 148, 152, 147, 165; *Wright* v. *Hunter*, 1 East, 30; *Brierly* v. *Cripps*, 7 Carr. & P., 709; *Smith* v. *Barrow*, 2 T. R., 476; *Simpson* v. *Rochman*, 7 Bing., 617; *Venning* v. *Leckie*, 13 East, 7; *Gale* v. *Leckie*, 2 Stark., 96.

*576] Where a note is payable to A, for the use of B, the legal title is *in A, and he is the party to transfer it, to receive payment, and to sue upon it. 3 Kent Com., 89; 1 Selw. N. P., 292; Chit. Bills, 180, 226, 428, 566; Baily Bills, 76, 115; *Chaplin* v. *Canada*, 8 Conn., 286; *Binney* v. *Phumpley*, 5 Vt., 500.

At law, the trustee has the whole title and interest. *Bank of the United States* v. *Devaux*, 5 Cranch, 91; *Irving* v. *Lowry*, 14 Pet., 300; *Bauerman* v. *Rodenus*, 7 T. R., 663; *Wake* v. *Tinkler*, 16 East, 36; *Tucker* v. *Tucker*, 4 Barn. & Ad., 745; Willis' Trustees, 72, and N. E., 73, 83, 86, 87; Lewin Trust., 267, 247, 481.

The express purpose of the trust was, to give Meade the legal title, and enable him to sue at law.

But even if Meade could not sue, the bearer could; and Meade could receive payment, or transfer by delivery. And having done so, he is presumed to have received full value

from the plaintiffs. 1 Selw. N. P., 292, citing Carth., 5; 2 Vent., 307; Skin., 264.

The banking company are not parties plaintiffs or defendants, on the record, nor is the suit brought for their use, nor have they in fact any interest in the case. And, in the language of the Supreme Court of the United States—

"It may be laid down as a rule, we think, which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named on the record." *Governor of Georgia* v. *Madrays*, 1 Pet., 122.

"Jurisdiction is neither given nor ousted by the relative situation of the parties concerned in interest, but by the relative situation of the parties named on the record." *Osborn* v. *Bank United States*, 9 Wheat., 738.

A trustee may sue in the federal courts without reference to the domicil of his *cestui que trust*. *Irvine* v. *Lowry*, 14 Pet., 298; *Bank United States* v. *Devaux*, 4 Cranch, 308; *Corporation of Washington* v. *Young*, 10 Wheat., 4; Story, Constitution, 566; Sergeant, C. L., 113, 114; 1 Kent Com., 348, 349.

These authorities are equally conclusive against the second cause assigned in the demurrer, that "those for whose benefit the suit is brought" are citizens of Mississippi.

No other cause of demurrer is assigned.

It is clear that jurisdiction is not divested, on the ground that Meade was a citizen of Mississippi, because the note was payable to him "or bearer," and, therefore, not within the provisions of the 11th section of the Judiciary Act of 1789. *Bullard* v. *Bell*, 1 Mason, 251. And in *Bank of Kentucky* v. *Wistar et al.*, 2 Pet., 326, the court say: "The other point has relation to the form of the bills which are made payable to individuals or bearer, concerning which individuals there is no averment of citizenship, and which, therefore, may have been payable in the first instance to parties not competent to sue in the courts of the United States. But this is also a question which has been considered and disposed of in our *previous decisions. This court has uniformly held [*577 that a note payable to bearer is payable to anybody, and not affected by the disabilities of the nominal payee."

Mr. Justice McLEAN delivered the opinion of the court.

This is a writ of error from the southern district of Mississippi.

The plaintiffs brought their action on four promissory notes, payable at different times, for different sums, and bearing different dates, except two, which were dated the 23d January, 1839. In each of the notes the defendants promised, or either

of them, to pay to Cowles Meade, or bearer, for the use of the Real Estate Banking Company of Hinds county, at their banking house in Clinton, the sum named, without defalcation, for value received.

The defendants demurred to the declaration, and assigned the following causes of demurrer:

1. "The plaintiffs cannot maintain the action, because, by their own showing, the defendants who are sued are also a part of the persons for whose use the suit is commenced."

2. "The court can have no jurisdiction of this case, because, although it is true, the nominal plaintiffs are the bearers of the paper sued on, and citizens of a state other than Mississippi, yet, those for whose benefit suit is brought, for any thing which appears in the declaration, are citizens of the state of Mississippi."

The notes in question passed by delivery, and the plaintiffs, as bearers, have a right to sue in their own names, as the promise to pay is made to bearer. The plaintiffs allege that they are citizens of New York, and, consequently, the Circuit Court had jurisdiction of the case. Where the citizenship of the parties give jurisdiction, and the legal right to sue is in the plaintiff, the court will not inquire into the residence of those who may have an equitable interest in the claim. They are not necessary parties on the record. A person having the legal right may sue, at law, in the federal courts, without reference to the citizenship of those who may have the equitable interest. *Irvine* v. *Lowry*, 14 Pet., 298. The judgment of the Circuit Court, which sustained the demurrer, is reversed; and the cause is remanded for further proceedings.

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*578] *THE UNITED STATES, PLAINTIFFS, *v.* ELI S. PRESCOTT ET AL., DEFENDANTS.

The felonious taking and carrying away the public moneys in the custody of a receiver of public moneys, without any fault or negligence on his part, does not discharge him and his sureties, and cannot be set up as a defence to an action on his official bond.[1]

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[1] DISTINGUISHED AND EXPLAINED. *United States* v. *Thomas*, 15 Wall., 347, 349 (see Id., 352); *York County* v. *Watson*, 15 So. Car., 9. FOLLOWED. *United States* v. *Morgan*, 11 How., 160; *United States* v. *Dashiel*, 4 Wall., 185; *United States* v. *Keehler*, 9 Id., 88; *Boyden* v. *United States*, 13 Id., 24; *Bevans* v. *United States*, 13 Id., 62. See also *United States* v. *Clark*, 6 Otto, 49. See note to *United States* v. *Morgan*, 11 How., 154.

The United States v. Prescott et al.

THIS case came up on a certificate of division in opinion between the judges of the Circuit Court of the United States for the District of Illinois.

On the 4th of March, 1839, Prescott was appointed receiver of public moneys at Chicago, in Illinois.

On the 1st of October, 1840, he executed a bond, together with twenty-seven other persons, who were all defendants in the present suit, in the penal sum of $150,000, the condition of which was as follows: "If the said Eli S. Prescott had truly and faithfully executed and discharged, and should truly and faithfully continue to execute and discharge, all the duties of said office, according to the laws of the United States, and moreover had well, truly and faithfully kept, and should well, truly and faithfully keep, safely, without loaning or using, all the public money collected by him, or otherwise, at any time placed in his possession and custody, till the same had been, or should be ordered by the proper department or officer of the government, to be transferred or paid out, and when such orders for transfer or payment had been or should be received, had faithfully and promptly made, and should faithfully and promptly make, the same as directed, and had done, and should do and perform, all other duties, as fiscal agent of the government, which have been or may be imposed by any act of Congress, or by any regulation of the Treasury Department made in conformity to law, and also had done and performed, and should do and perform, all acts and duties required by law, or by direction of any of the executive departments of the government, as agent for paying pensions, or for making any other disbursements which either of the heads of those departments might be required by law to make, and which were of a character to be made by a depositary constituted by an act of Congress, entitled 'An act to provide for the collection, safe keeping, transfer and disbursements of the public revenue,' approved July 4, 1840, consistently with the other official duties imposed upon him, then the said obligation to be void and of none effect, otherwise it should abide and remain in full force and virtue."

In June, 1843, the United States brought an action of debt upon this bond against Prescott and all his securities, setting forth, amongst other breaches, that on the 15th of June, 1842, Prescott was ordered by the Secretary of the Treasury [*579 to transfer the public *moneys to Edward H. Haddock, and that he neglected and refused so to do.

The defendants filed several pleas. The 3d, 4th and 5th were of the same character, and it is only necessary to insert one of them.

"8. And for a further plea in this behalf, the said defendants say *actio non*, because they say that the said Eli S. Prescott, before the commencement of this suit, did pay to the said plaintiffs all moneys which came into his hands as receiver of public moneys, excepting the sum of $12,815; and the said defendants aver that the said Eli S. Prescott tendered to the said plaintiff the sum of $127 before the commencement of this suit; and the said defendants aver that whilst the said Eli S. Prescott had said money in his possession, and before the commencement of this suit, some person or persons, to said defendants unknown, feloniously did steal, take, and carry away from the possession of the said Eli S. Prescott, the sum of $11,688; part and parcel of said money received by the said Eli S. Prescott, as receiver of public moneys, although the said Eli S. Prescott used ordinary care and diligence in the safe-keeping of the same, and this they are ready to verify, wherefore they pray judgment, &c."

To these pleas the plaintiffs demurred generally, and the defendants joined in the demurrer.

And the cause being argued upon the said demurrer before the court, the opinions of the judges were opposed on this question, namely: Does the felonious stealing, taking, and carrying away the public moneys in the custody of a receiver of public moneys, without any fault or negligence on his part, discharge him and his sureties, and is that a good and valid defence to an action on his official bond?

Upon this question the cause came up.

Nelson, (attorney-general,) for the plaintiffs.
Dickey and *Burke*, for the defendants.

Nelson said, that if it were not for the printed argument, filed on behalf of the defendants, he would have thought it enough to say, with respect to the money being stolen, that there was no such condition in the bond. It was contended by the other side, that the case was to be governed by the principles of bailment. If the bond were to be laid aside, and the case examined as if it were one of parol contract, it would still be found that the defendant was responsible. In *Southcote's* case, 4 Co., 83, it was held no defence to say that goods were stolen, and in Willes, 118, it was again affirmed that a defendant was responsible for robbery. But this is not a case of general bailment; it rests on special contract. All the principles which govern it are summed up in Story Bailm., 21. Bailments may be enlarged or restricted by special contract. The condition of the bond here is to keep safely, and it is of

course a special bailment. It would be mischievous to apply the doctrine of *general bailments to such cases. If carriers are held responsible from motives of public policy, [580 much more strongly is the necessity felt in the cases of officers of government, where the door could so easily be opened to collusion and fraud. In *Coggs* v. *Bernard*, 2 Ld. Raym., 918, this doctrine is indicated, when speaking of the fifth species of bailment, and the same principle is sustained by Raymond, 220; 1 Vent., 190; Holt, 131; 1 Wils., 281; 1 T. R., 27; Strange, 128.

The case relied upon by the other side is 17 Mass., 479, where gold was deposited with the Essex Bank for safe keeping, and stolen by the officers of the bank. But that was a bailment without consideration. The bank received nothing for keeping it, whereas, in this case, the party undertook to keep the money, and was paid for it.

The argument of *Dickey* and *Burke* was as follows:

1. The defendant, Prescott, is a depositary for hire, and unless his liability was enlarged by the special contract to keep safely, he is only subject to the liabilities imposed by law upon such a depositary.

2. The special contract to keep safely does not enlarge the liability in the case of a depositary for hire.

1st. It does not enlarge it by the ordinary meaning and acceptation of the terms "keep safely," nor,

2d. Has the judicial construction put on those words enlarged the liability.

1. The defendant is a depositary for hire, and comes under the liability imposed upon such depositary. He is within the class laid down by Lord Holt, *Coggs* v. *Bernard*, 2 Ld. Raym., 917, as the fifth class of bailments, and called by Judge Story in his Commentary on Bailments, and Jones on Bailments, *locatio custodiæ*, or "deposits for hire," or "the hiring of care and services to be performed or bestowed on the thing delivered," or "hire of custody." Story Bail., § § 8, 442, 2d ed.; Jones Bail., 90, 91, 96, original ed.

Such a depositary is bound to ordinary diligence, and only responsible for losses by ordinary negligence. Story Bail., § 442; Jones Bail., 97, 98, 99; *Platt* v. *Hibbard*, 7 Cow. (N. Y.), 497.

If he uses due care, and the property deposited is nevertheless stolen, he is excused; *Coggs* v. *Bernard*, 2 Ld. Raym., 918, where Lord Holt says, "he is only to do the best he can; and if he be robbed, it is a good account;" and again, (p. 918,) "and yet if he receives his master's money and keeps it locked

up, with a reasonable care, he shall not be answerable for it though it be stolen." See also Story Bail., §§ 444, 455, 2d ed.; *Roberts* v. *Turner*, 12 T. R., 232; *Brown* v. *Anderson*, 2 Wend. (N. Y.), 593.

If then the defendant, Prescott, was such a depositary, the *581] pleas averring that the money was stolen without any default on his part, *and that he used ordinary care in keeping the same, are good pleas, and excuse his liability.

2. The words "keep safely," in sect. 6 of the act of July, 1840, and in the condition of the bond declared on, following the words of the act, do not alter or extend the liability, otherwise imposed by law.

1st. They do not by the ordinary meaning and acceptation of the terms.

In the construction to be given to words, they are to be received according to their ordinary meaning and import, or such meaning as is given to them by the common sense and understanding of mankind. In this sense no other construction can be given to the words, "keep safely," than to keep with that degree of safety which prudent men ordinarily exercise, where safety is required; the common sense of mankind would construe it to mean reasonable safety. When A. accepts to keep safely, the meaning he would be apt to give to the contract, (supposing no judicial meaning had been given to the words,) would be, such reasonable safety as in the exercise of prudence, he and other men ought, under the circumstances of the case, to use; and this is exactly the degree of diligence or care required in the contract of bailment called "*locatio custodiæ*."

The words "keep safely," therefore, considered in their ordinary and common acceptation, do not vary the usual liability of a depositary for hire.

2d. Judicial construction has not given a higher meaning to these words.

In *Southcote's* case, 4 Co., 83, 84, the plaintiff had delivered goods to the defendant to be by him safely kept. The plea was, that they were stolen out of the possession of the defendant, and judgment was given because the goods were to be safely kept. The plea, however, was defective in not averring that they were stolen without his default, or that he used ordinary care and diligence, and theft being evidence of ordinary neglect according to Sir Wm. Jones, (although this is now doubted,) it would be presumed that the defendant had been guilty of ordinary neglect, and this is in accordance with the opinion of Sir Wm. Jones in commenting upon this case, (Jones Bail., 43, original edition,) where he says: "If

the plaintiff, instead of replying, had demurred to the plea in bar, he might have insisted in argument, with reason and law on his side, that, although a general bailee to keep be responsible for gross neglect only, yet Bennet had, by a special acceptance, made himself answerable for ordinary neglect at least; that it was ordinary neglect to let the goods be stolen out of his possession; and he had not averred that they were stolen without his default;" thereby intimating, that if such averment had been made in Southcote's case, the plea would have been good. In the present case the pleas contain such averments.

*The words "keep safely," then, by Southcote's case, and in the opinion of Jones, meant to bind the depositary to ordinary diligence only. [*582

The case of *Coggs* v. *Bernard*, 2 Ld. Raym., 909, by the opinion of Lord Holt and the majority of the court, is to the same effect.

The question in point, decided, was, "that if a man undertake to carry goods safely and securely, he is responsible for any damage through his neglect, although he was not a common carrier, and was to have nothing for the carriage." (See 1st marginal note.)

The inference to be drawn is, if there was no neglect, he was not liable.

In commenting on the effect of the undertaking "to keep and carry safely," the judges who delivered opinions in this case differed. Lord Holt, who delivered the celebrated opinion which has been the foundation of the modern law of bailment, and which is entitled to the most consideration, together with all the other judges, (except Powell, J.) held, (as is remarked by Judge Story, Com. on Bail., sect. 35, 2d edition,) "that upon a promise by a bailee, without reward to keep or carry safely, he is not responsible for injuries or losses occasioned by the acts of wrong-doers, and *à fortiori*, that he is not responsible for a theft not caused by his own neglect." In the same section, Judge Story remarks, "Mr. Justice Powys, and Mr. Justice Gould, seem to have agreed in opinion with Lord Holt." By referring to the opinion of the judges in this case, the same doctrine will be found. Lord Holt says, (2 Ld. Raym., 915,) "Nay, suppose the bailee undertakes safely and securely to keep the goods, in express words, yet even that won't charge him with all sorts of neglect. For if such a promise were put into writing, it would not charge so far even then. * * And if a promise will not charge a man against wrong-doers, when put in writing, it is hard it should do it more so when spoken.

Doct. and Stud., 130, is in point, that though a bailee do promise to redeliver goods safely, yet if he have nothing for the keeping of them, he will not be answerable for the acts of a wrong-doer. So that there is neither sufficient reason or authority to support the opinion in Southcote's case; if the bailee be guilty of gross negligence, he will be chargeable, but not for any ordinary neglect." See 2 Ld. Raym., 914 and 915; Lord Holt's comment on Southcote's case. In the same case, Gould, J., agreeing with Lord Holt, says, (2 Ld. Raym., p. 909,) "So if goods are deposited with a friend, and are stolen from him, no action will lie. * * But if a man undertakes expressly to do such a fact, safely and securely, if the thing comes to any damage by his miscarriage, an action will lie against him." And again, (p. 910,) "But when a man undertakes especially to do such a thing, it is not hard to charge him for his neglect, because he had the goods committed to his custody upon those terms." It is apparent by the reasoning of these judges, that they intended to place the *583] liability in the case of a special *contract to keep safely, upon the neglect or miscarriage of the depositary, and that he would not be liable for the acts of wrong-doers, without his default; and this was the opinion of Lord Holt and all the other judges, except Powell, J. See Story Bail., § 35.

It is true that Powell, J., in the same case, says, (p. 910,) "The party's special assumpsit and undertaking obliges him so to do the thing, that the bailor come to no damage by his neglect, and the bailee in this case shall answer accidents, as if the goods are stolen, but not such as happen by the act of God;" but from the reference made to the case of the ferryman, immediately after, he was probably alluding to the case of the common carrier. But, at any rate, the reason assigned by him for the liability of the bailee in case of accidents, as in case the goods are stolen, viz., that the bailee has a remedy against the wrong-doers, as an appeal of robbery, or action against the hundred, is unsatisfactory. It might furnish a reason in England, where a speedy and certain remedy is given for the man robbed, by a special action on the case against the hundred for damages equivalent to his loss unless they make hue and cry after the felon, and take him, which excuses them. 3 Bl. Com., 160. But no such remedy exists here. And it is to be observed, that the reason given by Powell, J., was probably altogether wrong. Sir Wm. Jones expresses his disapprobation as follows, (Jones Bail., 44, orig. ed.:) "Mr. Justice Powell, speaking of Southcote's case, which he denies to be law, admits that 'if a man does under-

take specially to keep goods safely, that is a warranty, and will oblige the bailee to keep them safely against perils, where he has a remedy over, but not against those where he has no remedy over.' One is unwilling to suppose that this learned judge had not read Lord Coke's report with attention; yet the case which he puts is precisely that which he opposes, for Bennet did undertake to keep the goods safely; and with submission, the degree of care demanded, not the remedy over, is the true measure of the obligation, for the bailee might have his appeal of robbery. Yet he is not bound to keep the goods against robbers without a most express agreement." Jones Bail., 44.

In 2 Bl. Com., 452, the same construction is given to the words "keep safely and securely," viz., "he is bound to take the same care of them as a prudent man would of his own," i. e. reasonable care. And the case of *Coggs* v. *Bernard*, 2 Ld. Raym., 909, is cited, and the law is spoken of as settled.

Finnucane v. *Small*, 1 Esp., 315, was a case in which the depositary received pay, and he was held, by the opinion of Lord Kenyon, to be liable only for ordinary neglect. In this case the property had been stolen from the depositary.

The American authorities are to the same effect.

Foster v. *The Essex Bank*, 17 Mass., 479, was a case of deposit of gold in a bank, under a memo. signed by the cashier, that it was "left for safe keeping;" the [*584 court, (Parker, J.,) delivered an elaborate opinion, and reasons on the nature of the undertaking to keep safely in a very full and satisfactory manner, (see pages 499, 500, 501 and 502,) showing that the contract to keep safely, in the case of a simple depositary, extends his liability to ordinary neglect, and in the case of a depositary for hire, the principle goes no farther than liability for ordinary neglect; "so that if he shows that he used due care, and nevertheless the goods were stolen, he would be excused." 17 Mass., 502.

1 Dane's Abr., chap. 17, art. 11, § 8, lays down the same doctrine.

Judge Story, (Story Bail., §§ 70, 71, 2d edition,) evidently leans to the same doctrine, where he says that "there is much to warrant the suggestion that in a case where the bailment is to keep safely, the depositary would not be liable for a loss by theft, unless it should arise from his own negligence, and want of due diligence and care."

Chancellor Kent (2 Kent Com., 563, note *d*, 3d edition) alludes to the decision in 17 Mass., 479, with approbation.

The great weight of authority, then, both in England and in this country, supports the doctrine, that under the contract

to keep safely, the depositary would not be liable for a theft committed without his default, and that in such case he is only liable for ordinary diligence.

The case relied on, chiefly, on the other side, is a dictum of Lord Chief Justice Willes, (*Kettle* v. *Bromsall*, Willes, 118,) where he speaks of the liability of the depositary to keep safely, in case he is robbed of the goods. But it is to be observed that this is said as being according to Southcote's case, the case of *Coggs* v. *Bernard*. Willes, 121. It is hardly conceivable how the judge, who delivered the opinion in *Kettle* v. *Bromsall*, could have fallen into such error, for the first authority cited by him, (Southcote's case,) had been expressly overruled in the last authority cited, (*Coggs* v. *Bernard*;) and in the last case, Lord Holt and the majority of the court, dissenting from Southcote's case, lay down a contrary rule, (as we have shown above,) viz.: that the depositary would not be liable for the acts of wrong-doers, without his default.

Chancellor Kent says, in the note above referred to, that the doctrine in *Kettle* v. *Bromsall*, Willes, 118, and in Southcote's case, "is held to be exploded in the case of *Foster* v. *Essex Bank*."

A distinction has sometimes been taken between a loss by theft, and a loss by robbery, from the last being considered irresistible, and the former not so. But see, as to this, Story Bail, § 39, 2d edition, where the distinction is refuted; and it is held that "no degree of vigilance will always secure a party from losses by theft," &c., &c.

*585] *When the contract is a special acceptance, the taking a reward can make no difference in the construction of it.

It is to be observed that where there is a special contract to "keep safely," the contract is expounded according to the meaning of the terms themselves, without inquiring whether a reward was paid or not. The acceptance is a sufficient consideration for the promise to keep safely, as was determined by the case in point in *Coggs* v. *Bernard*, (see first mar. note;) and in that case the court decided that the bailee, to keep or carry safely, is liable for ordinary negligence, without inquiring whether he received a reward or not. None was averred in the declaration, and there might or might not have been one.

In Hargrave and Butler's note to 2 Co. Litt., n. 78, it is said, in reference to the decision in the case of *Coggs* v. *Bernard*, that "it was wholly grounded on a special undertaking to carry safely, without stating either that the defendant was to have hire or was a common carrier." In giving an exposi-

tion, therefore, to the contract "to keep safely," it makes no difference whether a reward was paid or not. It is the special acceptance that makes the party bound to ordinary diligence and liable for ordinary neglect.

Again, In the contract "to keep safely," it is the special acceptance (without inquiring into a reward or not) that makes the party bound to ordinary diligence; and in the ordinary contract of a depositary for a reward, it is the reward that puts the party to ordinary diligence. Story Bail., § 442; Jones Bail., 49, 91, 98, 99, original ed. The liability, therefore, of the special depositary to keep safely, and of the depositary for a reward, is the same; and if the depositary for a reward accepts specially, the receiving the reward cannot put him to greater diligence than what the law determines that fact shall put a depositary to, which is ordinary diligence, (Story Bail., § 442,) and nothing more.

The cases and authorities that expound the meaning of the words "keep safely," speak of them generally in reference to the contract of *depositum*, or naked bailment without reward; (Story Bail., § 33, the opinion of the judges in *Coggs* v. *Bernard*, in relation to these words altering the responsibility in case of naked bailment; Southcote's case, 2 Bl. Com., 452; 17 Mass., 479;) and as enlarging the responsibility from slight diligence, in such case, to ordinary diligence. If the cases and authorities are silent as to the effect of these words in the case of other bailees, such as the depositary for hire, common carrier, &c., it is because, in these cases, their ordinary legal liability is the same, or more extensive, than the words "keep safely" import, requiring ordinary diligence in some, and extraordinary diligence in others. No one would contend that these words enlarged the responsibility of a common carrier, who is liable for more than what they would import, viz., for all losses except "by the act of God, or the king's enemies;" *neither should it be contended that they enlarge the responsibility of the bailee for hire, whose usual legal responsibility is the same as what the special acceptance in the case of simple deposit has been decided to be, viz., ordinary diligence. These words only make a difference in the case of *depositum*, or naked bailment, because the usual liability in that case, for gross neglect only, is inconsistent with safe keeping. And this agrees with Sir William Jones, (p. 61, original ed.) where he says, in remarking on the opinion of Powell, J., in *Coggs* v. *Bernard*, "Now the reason assigned by the learned judge for the cases in the register and year-books, which were the same with *Coggs* v. *Bernard*, viz., the party's special assumpsit, obliged him so to do the thing that the bailor come to [*586

no damage by his neglect, seems to intimate that the omission of the words *salvo et securè* would have made a difference in this case, as in that of a deposit, but I humbly contend that those words are implied by the nature of a contract which lies in feasance," &c. In the present case the duty of the receiver, for which he is paid, lies in feasance, for he is to receive, keep, transfer, and pay out, and do all other acts, as fiscal agent, which may be imposed on him by law, or the directions of the Treasury Department, (§ 6, act of 1840.)

By section 12, of the act of 4th July, 1840, government-agents are required to examine "the money on hand and the manner of its being kept;" and by section 13, the register is required to examine and report, from time to time, the condition of the money on hand with the receiver; and by section 14, the officers may be allowed for fire-proof chests, vaults, &c., for safe-keeping, to be expressly authorized by the Secretary of the Treasury, whose directions, &c., "are to be strictly followed."

The law, then, vests the discretion of the safe-keeping, in a measure, in government agents, and in the Secretary of the Treasury, "whose directions are to be strictly followed." If, then, the Secretary of the Treasury has directed the money, deposited with the receiver, to be placed in a particular place, vault, &c., and it is stolen there; or, if the government agent, having examined "the manner of its being kept," is satisfied, and so reports, and still the money is stolen; the receiver, in either case, would not be liable, without his default; Story Bail., § 74, 2d ed.; "if the depositor agree that the goods may be kept in a particular place, &c., he cannot object afterwards that the place is not a safe one." And *non constat* but that, in the present case, the money had been directed to be kept in the particular place where it was stolen, nor but that the government agent had examined "the manner of its being kept," and reported it to be safe; in either of which cases the defendant, without his own default, would not be liable.

Finally, it may be said that government requires nothing unreasonable from its officers. If, as in the case of the *587] Essex Bank, *where $53,000 of gold was deposited, under a memo., for safe-keeping, and who might be considered in the light of a public depositary, and where considerations of public policy, in return for the extraordinary privileges conferred on the bank, were entitled to all their weight, the bank was held to ordinary neglect only, why should greater responsibility be thrown on a receiver of public money? Ch. J. Parker, in that case, 17 Mass., 501, says, "and this certainly is the more reasonable doctrine, for the common understanding

of a promise to keep safely, would be, that the party would use due diligence and care to prevent the loss or accident; and there is no breach of faith or trust, if, notwithstanding such care, the goods should be spoiled or purloined." A contrary doctrine to this would be unreasonable. It would also be against public policy; for, if the receiver is to be held liable, when money is stolen from him without his default, having used due diligence and care in the safe-keeping, men of common prudence and responsibility would cease to become his sureties, since they would make themselves responsible, not merely for his prudence, good faith, and honesty, in keeping money, but sureties against the cunning, dishonesty, and villany, of all mankind.

Mr. Justice McLEAN delivered the opinion of the court.

This action was brought in the Circuit Court for the district of Illinois, on a bond given by Prescott, with the other defendants as his sureties, for his faithful performance of the duties of receiver of public moneys, at Chicago, in the state of Illinois. The defence pleaded was, that the sum not paid over by the defendant, Prescott, and for which the action was brought, had been feloniously stolen, taken, and carried away from his possession, by some person or persons unknown to him, and without any fault or negligence on his part; and he avers that he used ordinary care and diligence in keeping said money, and preventing it from being stolen.

To this plea, the plaintiffs filed a general demurrer; and on the argument of the demurrer, the opinions of the judges were opposed on the question, whether "the felonious taking and carrying away the public moneys in the custody of a receiver of public moneys, without any fault or negligence on his part, discharged him and his sureties, and may be set up as a defence to an action on his official bond?" And this point is now before this court, it having been certified to us under the act of Congress.

On the part of the defendant it is contended that the defendant, Prescott, was a depositary for hire; and that unless his liability was enlarged by the special contract to keep safely, he is only subject to the liabilities imposed by law upon such a depositary; that the special contract does not enlarge his liability.

This is not a case of bailment, and consequently, the law of bailment does not apply to it. The liability of the defendant, Prescott, arises out of his official bond, and principles which are founded upon *public policy. The conditions [*588
of the bond are, that the said Prescott has "truly and

faithfully executed and discharged, and shall truly and faithfully continue to execute and discharge, all the duties of said office," (of receiver of public moneys at Chicago,) "according to the laws of the United States; and moreover has well, truly, and faithfully, and shall well, truly, and faithfully, keep safely, without loaning or using, all the public moneys collected by him, or otherwise at any time placed in his possession and custody, till the same had been or should be ordered, by the proper department or officer of the government, to be transferred or paid out; and when such orders for transfer or payment had been or should be received, had faithfully and promptly made, and would faithfully and promptly make, the same, as directed," &c.

The condition of the bond has been broken, as the defendant, Prescott, failed to pay over the money received by him, when required to do so; and the question is, whether he shall be exonerated from the condition of his bond, on the ground that the money had been stolen from him?

The objection to this defence is, that it is not within the condition of the bond; and this would seem to be conclusive. The contract was entered into on his part, and there is no allegation of failure on the part of the government; how, then, can Prescott be discharged from his bond? He knew the extent of his obligation, when he entered into it, and he has realized the fruits of this obligation by the enjoyment of the office. Shall he be discharged from liability, contrary to his own express undertaking? There is no principle on which such a defence can be sustained. The obligation to keep safely the public money is absolute, without any condition, express or implied; and nothing but the payment of it, when required, can discharge the bond.

The case of *Foster et al.* v. *The Essex Bank*, 17 Mass., 479, was a mere naked bailment, and of course does not apply in principle to this case. The deposit in that case was for the accommodation of the depositor, and without any advantage to the bank, as the court say, "which can tend to increase its liability. No control whatever of the chest, or of the gold contained in it, was left with the bank or its officers. It would have been a breach of trust to have opened the chest, or to inspect its contents."

Public policy requires that every depositary of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that "he should keep safely" the moneys which come to his hands. Any relaxation of this condition would open the door to frauds, which might be practised with impunity. A depos-

itary would have nothing more to do than to lay his plans and arrange his proofs, so as to establish his loss, without laches on his part. Let such a principle be applied to our postmasters, collectors of the customs, receivers of public *moneys, and others who receive more or less of the [*589 public funds, and what losses might not be anticipated by the public? No such principle has been recognized or admitted as a legal defence. And it is believed the instances are few, if indeed any can be found, where any relief has been given in such cases by the interposition of Congress.

As every depositary receives the office with a full knowledge of its responsibilities, he cannot, in case of loss, complain of hardship. He must stand by his bond, and meet the hazards which he voluntarily incurs.

The question certified to us is answered, that the defendant, Prescott, and his sureties, are not discharged from the bond, by a felonious stealing of the money, without any fault or negligence on the part of the depositary; and, consequently, that no such defence to the bond can be made.

BERNARD PERMOLI, PLAINTIFF IN ERROR, *v.* MUNICIPALITY NO. 1 OF THE CITY OF NEW ORLEANS, DEFENDANT IN ERROR.

This court has not jurisdiction, under the 25th section of the Judiciary Act, of a question whether an ordinance of the corporate authorities of New Orleans does or does not impair religious liberty.

The Constitution of the United States makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws.[1]

The act of February 20th, 1811, authorizing the people of the territory of Orleans to form a constitution and state government, contained, in the third section thereof, two provisos; one in the nature of instructions how the constitution was to be formed, and the other, reserving to the United States the property in the public lands, their exemption from state taxation, and the common right to navigate the Mississippi.

The first of these provisos was fully satisfied by the act of 1812, admitting Louisiana into the union, "on an equal footing with the original states." The conditions and terms referred to in the act of admission referred solely to the second proviso, involving rights of property and navigation.

The act of 1805, ch. 88, extending to the inhabitants of Orleans territory the rights, privileges and advantages secured to the North Western territory by the ordinance of 1787, had no further force after the adoption of the state constitution of Louisiana, than other acts of Congress, organizing the territorial government, and standing in connection with the ordinance. They

[1] APPLIED. *Ex parte Garland*, 4 Wall, 398.

are none of them in force unless they were adopted by the state constitution.[2]

THIS case was brought up by writ of error, under the 25th section of the Judiciary Act, from the City Court of New Orleans, the highest appellate court in the state to which the question could be carried.

In 1842, the defendants in error passed the following ordinance:

"Municipality No. 1 of the city of New Orleans.

"Sitting of Monday, October, 31st, 1842.—Resolved, that from and after the promulgation of the present ordinance, it shall be unlawful to carry to, and expose in, any of the Catholic churches of this municipality, any corpse, under the penalty of a fine of fifty dollars, to be recovered for the use of this municipality, against any person who may have carried into or exposed in any of the aforesaid churches any corpse, and under penalty of a similar fine of fifty dollars against any priest who may celebrate any funeral at any of the aforesaid churches; and that all the corpses shall be brought to the obituary chapel, situated in Rampart street, wherein all funeral rites shall be performed as heretofore.

Signed, PAUL BERTUS, Recorder.

Approved November 3d.

Signed D. PRIEUR, Mayor."

And a few days afterwards, the following:—

"Sitting of November 7th, 1842.—Resolved, that the resolution passed on the 31st October last, concerning the exposition of corpses in the Catholic churches, be so amended as to annul in said resolution the fine imposed against all persons who should transport and expose, or cause to be transported or exposed, any corpses in said churches.

"Be it further resolved, that the said fine shall be imposed on any priest who shall officiate at any funerals made in any other church than the obituary chapel.

Signed, PAUL BERTUS, Recorder.

Approved, November 9th.

Signed, D. PRIEUR, Mayor."

[2] FOLLOWED. *Strader* v. *Graham*, 10 How., 94; *Dred Scott* v. *Sandford*, 19 Id., 491.

The provision of the ordinance of 1787, declaring the navigable waters leading into the Mississippi and the St. Lawrence "common highways and forever free" does not restrict the powers of Congress, or of the state, to legislate respecting these waters. *Woodman* v. *Kilbourn Manuf. Co.*, 1 Abb. (U. S.), 158; s. c. 1 Biss., 546. As to obstructing a river emptying into the Mississippi, see *Columbus Insurance Co.* v. *Curtenius*, 6 McLean, 209. And see *Huse* v. *Glover*, 15 Fed. Rep. 297.

On the 11th November, 1842, the municipality issued the following warrant against Permoli, a Catholic priest:

"Municipality No. 1
v.
Bernard Permoli.

"Plaintiff demands of defendant fifty dollars fine, for having, on the 9th November, 1842, officiated on the body of Mr. Louis LeRoy, in the church St. Augustin, in contravention of an ordinance passed on the 31st of October last."

To which the following answer was filed:

"The answer of the Reverend B. Permoli, residing at New Orleans, to the complaint of Municipality No. 1;

"This respondent, for answer, says: true it is that the corpse of Mr. Louis Le Roy, deceased, was brought (enclosed in a coffin) in the Roman Catholic church of St. Augustin, and there exposed; and that when there thus exposed, this respondent, as stated in the complaint, officiated on it, by blessing it, by reciting on it all the other funeral prayers and solemnity, all the usual funeral ceremonies *prescribed [*591 by the rites of the Roman Catholic religion, of which this respondent is a priest. That in this act he was assisted by two other priests, and by the chanters or singers of the said church.

"This respondent avers, that in so doing he was warranted by the Constitution and laws of the United States, which prevent the enactment of any law prohibiting the free exercise of any religion. He contends that the ordinance on which the complainants rely is null and void, being contrary to the provisions of the act of incorporation of the city of New Orleans, and to those of the Constitution and laws of the United States, as above recited.

"This respondent therefore prays to be hence dismissed with costs.

Signed, D. SEGHERS, of counsel."

The judge, before whom the case was tried, decided that the ordinance was illegal, and not supported by any of the acts of the legislature incorporating the city of New Orleans. But the case being carried up by appeal to the City Court, the decision was reversed, and judgment entered in favor of Municipality No. 1 against Permoli, for fifty dollars and costs.

The judge of the City Court, before deciding the case, made the following remarks, which it may not be inappropriate to transcribe.

"Before entering into statement of the case, as it appeared on the trial before this court, I consider it necessary to give a mere outline of the circumstances which induced the Council of the First Municipality to pass the ordinances of the 31st of October and 7th of November, 1842.

"By an ordinance of the corporation of the city of New Orleans, approved 26th September, 1827, and entitled 'An ordinance supplementary to an ordinance concerning public health,' it was 'Resolved, that from and after the first of November next (1827,) it shall not be lawful to convey and expose into the parochial church of St. Louis any dead person, under penalty of a fine of fifty dollars, to be recovered for the use of the corporation, against any person who should have conveyed or exposed any dead person into the aforesaid church; and also under penalty of a similar fine of fifty dollars, against all priests who should minister to the celebration of any funeral in said church; and that from the first of November of the present year, (1827,) all dead persons shall be conveyed into the obituary chapel in Rampart street, where the funeral rites may be performed in the usual manner.'

"This ordinance continued in force during a period of fifteen years, without any opposition on the part of the Catholic Clergy or population; but in the year 1842, the late lamented and venerable revered Abbé Moni, curate of the parish of St. Louis, having departed this life, some misunderstanding took place between his successor and the churchwardens. The new curate and assistant clergy abandoned the cathedral, and commenced to celebrate funeral ceremonies in *592] other churches than the obituary chapel, this chapel being *under the administration of the said wardens. The council thereupon passed the ordinances, for the violation of which the defendant is sued.

"The case was presented here on the same pleadings as in the court below, but the plaintiff's counsel introduced evidence to prove several facts; this evidence was in substance as follows:

"The Right Reverend A. Blanc, Bishop of New Orleans, testified that the dogmas of the Roman Catholic religion did not require that the dead should be brought to a church, in order that the funeral ceremonies should be performed over them; that this was a matter of discipline only; that the witness, as bishop of this diocese, had authorized the clergy to leave the cathedral, and not to officiate at funeral rites at the obituary chapel, and that these ceremonies might be celebrated at the house where the dead person expired, or at any other place designated by the bishop.

"The Reverend C. Maenhant, curate of the parish of St. Louis, testified, that he was the curate of said parish, and in that capacity he had given orders for no funeral service to be said at the obituary chapel; that, from the situation of the clergy with regard to the wardens, these funeral services could not, with propriety, be performed at said chapel; that he had been several times applied to, by persons who wished these ceremonies celebrated over the dead bodies of their friends or relatives at the obituary chapel, but he had replied that, under present circumstances, these ceremonies would not be performed at that place, but at the chapel of St. Augustin, or in the house where the deceased person was lying, at the choice of the relatives.

"Cross-examined.—This witness testified, that the St. Augustin chapel was, in his opinion, as conveniently situated for these purposes as the obituary chapel; that, in the funeral office, there is nothing calculated to disturb the public peace, nothing contrary to morals, and that the greatest decency is always observed in these mortuary rites.

"The Reverend Jacques Lesne testified, that he is the priest employed as chaplain at the obituary chapel; that he is entitled to no remuneration, besides what he receives from the church-wardens, for attending at the chapel, to bless the bodies of the dead which are brought there; that he does not celebrate funeral obsequies with that pomp which is given to them in special cases, but he continues, with the permission of the bishop, to read the office of the dead, whenever required, at the obituary chapel, as he did previous to the departure of the clergy from the cathedral; that he is not permitted to leave the chapel to accompany funerals to the cemetery.

"Cross-examined.—He said, there is nothing immoral or contrary to the public tranquillity in the prayers which are said at funerals.

"Messrs. José Fernandez, Bernard Turpin, Anthony Fernandez, and Joseph Génois, proved that, for fifteen years past, the funeral *service has been performed at [*593 the obituary chapel, only that this chapel is the best situated for this purpose, and that nothing disorderly ever occurred there.

"Mr. A. Fernandez, cross-examined, added that he had never known of the occurrence of any disturbance of the public peace, during the ceremonies at the St. Augustin chapel, but he had heard a great deal of complaint about it; and that, being a native of New Orleans, and having almost constantly resided here, he has never seen or heard of the performance of funeral rites at any of the Protestant churches.

"The Honorable Paul Bertus, recorder of Municipality No. 1, proved, that having had the misfortune to lose his sister-in-law, he desired that the funeral solemnities should have been celebrated at the obituary chapel; but that the clergy had left him no choice but between the St. Augustin chapel and the mortuary house, and that he determined upon the latter place.

"The following resolutions, passed by the church-wardens of the parish of St. Louis, were next introduced:

"'Sitting of Friday, 11th November, 1842.—Resolved, that the obituary chapel shall be open for the reception of the remains of all deceased Catholics.

"'Resolved, that all persons who desire to have dead bodies exposed in funeral state, at the said chapel, are requested to give notice to the secretary of the wardens, in order that he may cause the necessary preparations to be made.

"'Resolved, that the public be informed that the Reverend Abbé Lesne shall continue to bless all bodies of dead persons brought to the obituary chapel, and that he will continue to say the usual funeral prayers at said chapel.'

"A correspondence between the mayor and the curate was also introduced, by consent of parties; but the court, considering this evidence as having no legal effect upon the case, contents itself merely with the mention of its introduction.

"Henry St. Paul, Esq., (one of defendant's counsel,) testified, that at Lexington, Kentucky, he saw the body of a deceased person taken into the Methodist Episcopal church, where a funeral oration was pronounced for the occasion by the Reverend Maffit, a minister of that persuasion, and that said oration was followed by prayers.

"Finally, the testimony of Mr. P. E. Crozat proved, that one of his friends having departed this life, and having been warned by Mr. Rufino Fernandez of the existence of the ordinance, he had nevertheless insisted that the body should be taken to the St. Augustin chapel for the funeral rites, holding himself responsible for the fine imposed, for his opinion was on the side of the clergy."

The judge of the City Court then gave his opinion at large and decided, as has already been stated, in favor of Municipality No. 1, from which decision a writ of error brought the case up to this court.

*594] * *William G. Read* and *Coxe*, for the plaintiff in error. *Barton*, for the defendant in error.

Read's argument was as follows:

Three questions arise on this record:—

1. Is the cause before the court, in accordance with the requirements of the act of September 24th, 1789, sect. 25?

2. Have the court jurisdiction over cases of infringement of the religious liberty of citizens of Louisiana, by the municipal authorities of that state?

3. Do the ordinances of November 3d and November 9th, recited in the record, infringe the religious liberty of citizens of Louisiana?

1. The first question is settled affirmatively by a bare inspection of the record. It falls within the very terms of the act.

2. For an answer to the second question, we must go back, in the first place, to the "ordinance for the government of the territory of the United States north-west of the river Ohio," passed by Congress on the 13th of July, A. D. 1787; part of preamble and article 1st: "And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws, and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory. * * It is hereby ordained and declared * * That the following articles shall be considered as articles of compact between the original states and the people and states in the said territory, and forever remain unalterable unless by common consent, to wit:

"Art. 1st. No person demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship or religious sentiments, in the said territory."

This ordinance, so comprehensive, so far-reaching, so simple, and sublime, established a new era for the millions who were destined to swarm within the sphere of its benevolent operation. For them, we may say in the words of the Roman poet, "*magnus ab integro sæclorum nascitur ordo!*" Till then, the right of the civil power to control the religion of the state had always been practically asserted and recognized; if not by moralists and theologians, at least by statesmen and jurists. Such has been the theory and practice of European governments, from the times when the emperors lighted the streets of Rome with blazing Christians, to the last liturgy forced on his Protestant subjects by the despot of Prussia. Even these American states, planted as they were by refugees from religious persecution, presented for generations anything but a land of religious liberty. The government of the Puritans was the very opposite of tolerant; and if they spilled not the

lives of their dissentient brethren as freely as others had done, it was because they fled from before their face into the wilderness. The government of Virginia *was equally *595] exclusive; and the land of the Calverts was peopled by exiles from both. Even Old Maryland, the primal seat of Christian freedom, has enfranchised the Israelite within our own brief memories. It was but yesterday that the Catholic was made eligible to office in North Carolina; and his continued exclusion from it disgraces New Hampshire to-day. But the ordinance of 1787 drew a broad line of distinction between the thirteen original states, which, in conquering their independence, acceded to all the known attributes of sovereignty, and the new ones to be carved out of the immense regions north-west of the Ohio; which come into the national community shorn of this flower, or rather thorn, of prerogative. It has left not the trace of a foundation, within their vast extent, whereon bigotry can erect her citadels. The United States have guarantied, to their inhabitants, religious liberty, as absolutely as they have republican government to us all.

This ordinance gave the key-note to our territorial legislation; and every subsequent passage has, on this paramount interest of humanity, harmonized therewith. By the act of April 7th, 1798, chap. 45, sect. 6, the inhabitants of the Mississippi territory were admitted to "all the rights of the people of the north-west territory, as guarantied by the ordinance;" and by the act of March 2d, 1805, chap. 437, sect. 1, the inhabitants of the territory of Orleans, (now Louisiana,) became entitled to "all the rights, privileges, and advantages secured by said ordinance, and enjoyed by the people of the Mississippi territory."

But we do not rely on the ordinance of 1787 and the aforesaid extending acts alone. The act of February 20th, 1811, chap. 298, by which the people of the territory of Orleans were empowered to form a constitution and state government, provided expressly in the 3d section, that the constitution to be formed, "should contain the fundamental principles of civil and religious liberty;" and the act of April 8th, 1812, chap. 373, sect. 1, by which the state of Louisiana was admitted into the union, provided "that all the conditions and terms contained in the said third section, should be considered, deemed, and taken as fundamental conditions and terms, upon which the said state is incorporated into the union."

The argument then is strictly consecutive; that, both under the ordinance of 1787, and the acts for admitting Louisiana

into the union, there is a solemn compact between the people of that state and the United States, (which this high conservative tribunal will protect from violation by state authority,) that they shall not be molested on account of their religious belief, or mode of worship; but that they shall forever enjoy religious liberty in the fullest and most comprehensive acceptation of the term.

To obviate the force of this conclusion, the judge "a quo" (Preaux) has, in his opinion, which is part of the record, (16 Pet., 285,) been compelled to advance doctrines of the wildest nullification, subversive of the very first principles of political morality. *He argues (pages 19 and 20 of the record,) "that the ordinance of 1787 was superseded [*596 by the constitution of the state of Louisiana; * * that constitution became the supreme law of the state, and all acts of Congress regulating the government of the territories of the United States ceased to exist within the limits of Louisiana—a sovereign state; * * the erection of Louisiana into an independent state, under a constitution adopted by her own citizens, and sanctioned by Congress, must necessarily set aside the charter established for its territorial government by Congress. To accede to a contrary doctrine, would be to admit that the power of Congress might be perpetuated, notwithstanding this solemn act, contrary to the rights of the states as defined and reserved by the federal compact," and this notwithstanding the most carefully expressed and guarded stipulations between the federal empire and its newly admitted member! To what a solemn farce does this argument reduce the earnest debates, the stern remonstrances, the enthusiastic appeals, which shake our legislative halls, and agitate this vast union from one extremity to the other! What avail our anxious compromises, our reluctant concessions, our cautious provisos, if, the instant a new partner is admitted to the national firm, she is at liberty to cast her most solemn obligations behind her? To what a ridiculous condition is one at least of the high contracting parties degraded by these fancies! Is she sovereign? Oh, no! not "sovereign" till she becomes "a state!" Is she subject? How can subject stipulate with sovereign? She is then a nondescript, "tertium quid"—a sort of political redemptioner; with just enough of the slave to submit to humiliating conditions, and just enough of the freeman to count the days the indentures have yet to run, and rejoice in anticipated repudiation of the most formal and explicit engagements.

Such, however, is not the doctrine of this court. In *Menard* v. *Aspasia*, 5 Pet., 515, Judge McLean, delivering the opinion

of the court, distinctly intimated that the ordinance of 1787 might be insisted on, as yet in force, within the sovereign state of Missouri. His words are too clear for misconception: "If the decision of the Supreme Court of Missouri had been against Aspasia, it might have been contended, that the revising power of this court, under the 25th section of the Judiciary Act, could be exercised;" and although the same learned judge, in *Spooner* v. *McConnell and others*, 1 McLean, 341, subsequently admitted that such provisions of the ordinance as were intended to produce a moral or political effect, (among which he classes those which secure the rights of conscience,) were annulled, in Ohio, by the adoption of the federal and state constitutions, as implying the "common consent" required for their abrogation; his language must necessarily be understood as harmonizing with that of this court in *Menard* v. *Aspasia*, and inapplicable to the case of Louisiana; unless it can be shown either that the federal constitu-
*597] tion abolished those provisions explicitly, *which it did not; or vested the states with powers repugnant thereto, which it did not; or superseded them by higher federal guaranties, which it did not; or that the constitution of Louisiana proceeded on either of those grounds, which it certainly did not, in terms; and, if at all, only by inference from the conditions imposed by the act for admitting that state to the union; which supposition leaves the case as strong as under the ordinance.

Equally unfortunate is the gloss by which the judge below has endeavored (pages 14 and 15 of the record) to evade the constitutional guaranties of Louisiana, on the subject of religious liberty. The Supreme Court of his own state, in the recent case of "*The Wardens of the Church of St. Louis, New Orleans*, v. *Blanc, Bishop, &c.*," (which is reported, as it would seem by authority, in the New Orleans Weekly Bulletin of July 6th, 1844,) holds this most emphatic language in reference to the constitution of Louisiana: "If the state constitution, framed a few years afterwards, contained no such restriction upon the legislative power, it was because it was thought unnecessary. It had already been settled, by solemn and inviolable compact, that religious freedom, in its broadest sense, should form the essential basis of all laws, constitutions and governments, which should for ever after be formed in the territory; and that compact was declared to be unalterable unless by common consent." * * * "In the opinion of the court, no man can be molested, so long as he demeans himself in a peaceable and orderly manner, on account of his mode of worship, his religious opinions and profession, and the religious

functions he may choose to perform, according to the rites, doctrine, and discipline of the church or sect to which he may belong. And this absolute immunity extends to all religions, and to every sect." So that, had the judiciary system of Louisiana permitted an appeal from the City Court of New Orleans to the supreme law tribunal of the plaintiff's own state, this court would not probably have been troubled with this argument.

3d. To read the ordinances, under which the plaintiff in error has been fined, is to dispose of the third question presented by this cause. Their bearing upon only one denomination of worshippers establishes their tyrannical character. Equality before the law is of the very essence of liberty, whether civil or religious. The performance of funeral obsequies, in buildings consecrated to public adoration of the Deity, is not confined to Catholics, but is practised by many other religious societies.

Again; the ordinances, as they now stand, contain but a single penal prohibition. They punish the performance of a religious function by individuals acting in their religious capacity or character, "according to the rites, doctrine, and discipline of the church to which they belong." They legislate for the priest as priest, and only as priest; not as a person transporting and exposing, or causing to be transported or exposed, any corpse in the interdicted *churches; [*598 but as the ordained celebrant of the office for the dead. What is this function he is forbidden to exercise? His church—the holy Catholic church—teaches that the mercy of God, while it mitigates, does not merge his justice; that, though many, through the atoning blood of the Saviour, escape eternal woe, they do not all pass directly from this probationary state to celestial bliss. Souls may depart this life unpolluted with mortal sin, which would consign them to everlasting misery, and yet bearing some stains of earth, which may not be admitted to His presence, before whose awful purity archangels veil their faces; and such, according to the fearful parable, are cast into that prison whence there is no egress till "payment of the uttermost farthing;" till expiation of "every idle word," of which we are to "give account." This expiatory state is termed by theologians, "purgatory;" and the Catholic doctrine is, that those who suffer there are aided by the prayers, almsdeeds, and other good works of their brethren still in the flesh, and the suffrages of the blessed spirits; exhibiting thus, blended in one tender "communion of saints," the church triumphant in heaven, the church militant on earth, and her suffering members in the middle state. Thus Catholic charity

ceases not with the last sad offices rendered to these fainting frames. When eyes that beamed on us with kindness are closed for ever, when the intellectual light that blazed about and guided us is darkened, when the hearts that loved and trusted us are cold and still, then are we stimulated to new demonstrations of affection, by the very agony of our bereavement. And the church, whose every precept is founded on the deepest philosophy of human nature, knowing that the efficacy of prayer is proportioned to its urgency, (as her divine master "in his agony prayed the more,") directs that they shall be offered under every circumstance that can animate hope, strengthen faith, or kindle charity. And, therefore, to her temples, where she receives the little child at "the laver of regeneration," and where she delights to bless the nuptial ring, she commands that we bring the bier; that, kneeling beside the dear remains of friend or relative, before the awful memorials of our redemption, surrounded by the relics of those who have gone before, and whom we believe to be confirmed in glory, in the very presence of the mercy-seat, where, less terrible but dearer than in the *shekinah* that filled the tabernacle of the early dispensation, the Almighty shrouds his glory beneath the sacramental veil, we may pour out our souls in fervent supplication, that those we mourn may be admitted to the mansions of eternal rest, and have their longing hopes crowned with everlasting fruition. And tell us not this is a fond superstition. It is an office in which "the church of the New Testament is in communion with the church of the Old;" with the Hebrew of three thousand years ago and the Hebrew of to-day. In it the Catholic unites with the Nestorian and the Copt, and the separated Greek, and every liturgist
*599] before the *sixteenth century; nay, with many of the wise and good, who, half doubting or rejecting it as of revealed authority, still practice it at the instinctive teaching of their own hearts; and with the great Dr. Johnson, bow down for them they loved in prayer that God "may have had mercy." But were it, on the contrary, the last novelty of the day; were it confined to the little chapel where the plaintiff in error ministers to his flock, still he could lay his hand on the ordinance of 1787, and exclaim with the sage of Tusculum, "Si erro, libenter erro; nec hunc errorem a me extorqueri volo!"

But the judge "a quo" has argued, that the praying for the dead in churches, with the body there present, is merely a disciplinary observance, as stated in the evidence of Bishop Blanc, and may, therefore, be regulated or controlled by the legislature, without violating religious liberty.

Now if there be aught essentially characteristic of religious

liberty, it is the exemption of ecclesiastical discipline (defined by the learned Hooker, "church order,") from secular control; and this, because the external forms and practices of religion are all that temporal power can directly invade. Faith, doctrine, are beyond its reach; objects of the understanding and the heart. Discipline is the sensible law which regulates the manifestation of our belief or opinion, in our public and social devotional intercourse with our Creator. Faith is the soul of religion; discipline the visible beauty in which she commends herself to our veneration and love. And it may be safely asserted, that there never was an arbitrary change introduced by governments into the religious opinions of a community, which was not masked by a pretended reform of exterior observances. What distinguishes the most numerous sect of Christians, in our country, from the many who agree with them on doctrinal points, but their method; the practical methods established by the founders of their peculiar system of church polity? In fact, they have taken their name from it. Yet what is "method" but another word for "discipline?" And would a member of that society consider himself in the enjoyment of religious liberty, if told "believe what you please of the divinity, the incarnation, the atonement, the influences of the Holy Spirit, baptism; but hold no class-meeting—hold no camp-meeting. These, though perhaps edifying and consolatory to you, are only matters of discipline, and amenable, therefore, to the municipal police?"

But the judge below contends that the Catholic office for the dead is not prohibited; inasmuch as it is permitted in the "obituary chapel." That is to say, religion is free, though its observances may be limited to a building in the possession of notorious schismatics, who might tax them to virtual prohibition, or apply the proceeds, at their own discretion, to the subversion of religion itself. The point is stated *arguendo;* but borrowed from the facts which gave rise to this appeal to the court.

*But it was further insisted below, that as a measure of quarantine precaution, the exposition of corpses may be prohibited. Not if such prohibitory legislation infringes rights more precious than mere animal health, which are guarantied by the Constitution or supreme law of the land. Judge Marshall's language on this point is clear. In *Wilson and others* v. *The Blackbird Creek Marsh Co.*, 2 Pet., 251, he says, "The value of the property on the banks (of this creek) must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to promote these objects, provided they do not come [*600

into collision with the powers of the general government, are undoubtedly within those which are reserved to the states." And if it be true, as inferred from this language, that a sovereign state, in her high legislative capacity, cannot, for the preservation of the health of her citizens, encroach on the constitutional guarantees for unrestricted commerce between man and man, can we suppose she could delegate the more dangerous power of interfering with the intercourse of man with God, specially guarded as it has been by the organic law of Louisiana, to a petty corporation? This case, however, passes clear of that suggestion. The judge below endeavored to implicate the priest, as the ultimate cause of exposing the sad relics of mortality which "lie festering in the shroud;" but the words of the ordinances, which, being penal, must be construed strictly, have expressly waived the penalty against all concerned in exposing, or causing them to be exposed, and directed their vengeance exclusively against the priestly function.

Barton's argument was this:

The First Municipality of New Orleans embraces the whole of what is called "the city proper," or "square of the city," and is bounded by a wide front levee, and the three streets of Esplanade, Rampart, and Canal, (which are as wide as Pennsylvania Avenue,) and covering also the whole suburbs, and low grounds in the rear of Rampart, extending to Lake Ponchartrain. The obituary chapel referred to in the record, is situate upon Rampart, but on the rearward side, and is thus separated from the city proper by an area of the width of three of its principal streets. The parochial church of St. Louis is the principal Catholic cathedral in the city, and, like the church of St. Augustin, is situate within the square of the city, where all the streets are very narrow.

New Orleans is visited annually with the yellow fever, in either the sporadic or epidemic form, and strong sanitary measures are deemed indispensable there to check the range and prevalence of the pestilence when it comes.

The great body of the Catholic citizens of New Orleans (other than those of Irish descent) reside in the First Municipality. The American Protestant population reside chiefly in the Second Municipality; they *have but one church in the First Municipality, and that fronts the Second, on Canal street.

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The usages of the Catholics there are to perform the mortuary services with the corpse exposed in open church, and before the congregation. Protestant churches there are never used

for such purposes, but services for the dead are performed at the cemeteries where the bodies are deposited.

The statement of facts contained in the opinion of the judge of the City Court having been used in the opening argument at this forum, gives warrant for the statement now made, which it is thought may be useful besides as a clue to the *quo animo* of the council of the First Municipality in enacting the ordinance complained of. If that measure had its origin in the mere purpose of infringing upon, and discriminating, to the prejudice of the religious rights of one denomination of Christians, it is not to be defended; but if designed merely as a regulation of sanitary police, for the preservation of the public health, then the law of necessity pleads in its behalf; and all obituary rites and ceremonials which tend to frustrate its objects, or impair its efficacy, must yield to the supremacy of the common good.

The learned counsel also cited and quoted, from the New Orleans Bulletin, an opinion of the Supreme Court of Louisiana, in the case of the *Wardens of the Church of St. Louis* v. *The Right Rev. Bishop Blanc*, instituted for the legal adjustment of certain differences between them in relation to church affairs, and which that court's judgment happily put an end to. It may be proper to remark, however, that this controversy was between Catholics; the one administering the temporalities of the church, and maintaining the rights of the corporation—the other administering the ecclesiastical functions, and maintaining the rights of the clergy. None but those professing the Roman Catholic religion can vote for church-wardens, as that opinion makes known; and none, therefore, are chosen such, who are not of that religious persuasion. Nothing could have been further from the designs of either party to that controversy, than to have trenched upon or abridged the civil or religious privileges of Catholicism itself, and still less to have favored, to its prejudice, any other denomination of Christians.

The controversy referred to having arisen, too, in the same year (1842) in which the ordinance was passed under which the fine was imposed on the plaintiff in error, leaves the inference fair that there was a necessary connection between them. But this is not so; and the circumstances strongly repel all inferences that the First Municipality council could have designed any infringement upon, or impairment of, the privileges of Catholics. The great body of the constituency of that council is Catholic; and it is believed, *ab urbe condita*, to the present day, a majority, and very frequently the whole, of that council, are such as have been reared up in the Catholic faith, and have continued in that religious persuasion. Hence,

if the *ordinance complained of abridges the privileges of Catholics, it abridges to a like extent the privileges of those who enacted it. If Catholics are wronged, Catholics have wronged them. This circumstance, indeed, may not lessen the injury, though it weakens the wrong. It may not test the lawfulness, but it defends the motive.

Though the particular ordinance under which the fine was imposed, bears date the 31st October, 1842, (modified as it was by the ordinance of the 7th of November, 1842,) yet the purpose and the occasion originated at a far earlier period, at a season when dissensions in the parochial church were unknown, and when the venerable and reverend Abbé Moni—a priest of all worth and all appreciation—presided as curate of the parish of St. Louis. As far back as the 26th of September, 1827, (fifteen years before,) the city council adopted an ordinance upon this subject of precisely similar import with that of the 31st October, 1842; and the motive of its enactment is conspicuous in the very title of the ordinance. It is entitled "An ordinance supplementary to an ordinance concerning public health." It is as follows:

"Resolved, That from and after the 1st of November next, (1827,) it shall not be lawful to convey and expose, into the parochial church of St. Louis, any dead person, under penalty of a fine of $50, to be recovered for the use of the corporation, against any person who should have conveyed or exposed any dead into the aforesaid church; and also under penalty of a similar fine of $50, against all priests who should minister to the celebration of any funeral in said church; and that from the 1st of November of the present year, (1827,) all dead persons shall be conveyed into the obituary chapel in Rampart street, where the funeral rites may be performed in the usual manner."

This act has remained in force ever since the 1st November, 1827. Its sole purpose was manifested in its title and provisions. All persons concerned gave it their obedience, and none ever complained that it impaired or abridged the civil or religious rights and privileges of the Catholics. No motive was attributed to its authors, other than the fears they may have entertained, in seasons of disease, of the perils of contagions, or the spread of epidemics. The ordinance of the 31st October, 1842, made no change whatever in the ordinance of 1827, except in its penalties, for conveying to, and exposing in, other Catholic churches, in the First Municipality, of dead bodies; the obligations not to do so, and to use the obituary chapel in Rampart street for that purpose, remained as before. Neither has the ordinance of the 7th November, 1842, wrought

any modification in that of 1827, for its amendments are confined by special references to the ordinance of the 31st October, 1842. That the ordinance of 1827, in principle, affected the rights and privileges referred to, equally with the subsequent ordinances, is too plain to be questioned; and that grievance seems altogether too slight and impalpable to [*603 *claim the protection of this august tribunal, when in fifteen years, for aught that is known, it has passed without complaint, and for the reason, it may be, that it was so subtle and ethereal as to elude detection.

2. The ordinances of the 31st of October, and the 7th November, 1842, do not invade the rights or privileges of the Catholic citizens of New Orleans.

The testimony of the Right Rev. Bishop Blanc would seem to establish this proposition incontrovertibly, for he says that "the dogmas of the Roman Catholic religion did not require that the dead should be brought to a church, in order that the funeral ceremonies should be performed over them; that this was a matter of discipline only." A dogma is a matter of church-faith, and affects conscience; discipline affects conduct only, where conduct does not affect faith. Under these ordinances, then, and the bishop's testimony, faith and conscience are left free; nothing molests the enjoyment or constrains the exercise of either. How is it made to appear, then, that they conflict with that "free enjoyment of religion," secured to the "inhabitants of the ceded territory," by the Louisiana treaty of 1803, which has been cited? Or, with the 1st article of the ordinance of 1787, which says, that "no person demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments," which has been also cited? Or, with the 4th section of the act of Congress of March 26, 1804, which prohibits the Legislative Council of the Orleans territory from passing any law "which shall lay any person under restraint, burden, or disability, on account of his religious opinions, profession, or worship; in all which he shall be free to maintain his own, and not burdened for those of another," which has been also cited? Or, with the act of Congress of the 20th February, 1811, (also cited,) which provides that the constitution to be formed by the people of the Orleans territory, "shall contain the fundamental principles of civil and religious liberty?" Or, with the act of Congress of the 8th April, 1812, admitting Louisiana as a state, and providing that the terms of admission contained in the 3d section of the act of 20th February, 1811, "shall be considered, deemed, and

taken, as fundamental conditions and terms upon which the said state is incorporated in the union?"

Supposing these various provisions, relied on by the plaintiff in error, to have not spent their force by the operations of time, nor the change of government, it is submitted, that there is nothing in these ordinances repugnant to either or any of them; for, if they be enforced evermore, they do not, and cannot, affect the religious sentiments or opinions, the worship or the liberty, of any. But the bishop says, further, that "these ceremonies might be celebrated at the house where the dead person expired, or at any other place designated by the bishop." The place, then, for the mortuary ceremonials *not being sacramental, how is the faith or conscience of Catholics assailed, by designating a few places in which they could not be performed? The essence of the right consists in the thing that is to be done, and not in the place of performance. If the thing itself were forbidden, then might have been drawn in question the power to forbid, coupled with the further inquiry, how far religious, as well as civil rights and privileges, may be constrained to give way to the public necessities and the common good?

*604]

3. The ordinances complained of were within the competency of the council of the First Municipality.

No express authority is needed to invest in a corporation a power of preservation of the public health. The law of necessity would constitute it an incident essential to its existence. *Vide* Bacon's Abridgment, tit. *Corp.* (D.) It is there laid down that "there are some things incident to a corporation—which it may do without any express provision in the act of incorporating—such are powers to make laws, for a body politic cannot be governed without laws." And Chief Justice Holt says, (Carth., 482,) "That every by-law, by which the benefit of the corporation is advanced, is a good by-law for that very reason, that being the true touch-stone of all by-laws."

So in matters of corporate police. In Com. Dig., 8, tit. *By-law* C, it is laid down, "That a by-law to restrain butchers, chandlers, et al., from setting up in Cheapside, or such other eminent parts in the city of London, was good"—(not because a special power was conferred to enact it, but)—"because such trades were offensive, and apt to create diseases; and that, therefore, for fear of infection, and for the sake of public decorum and conveniency, such kind of offensive trades might be removed to places of more restraint." The validity of a similar by-law, made by the corporation of Exeter, was afterwards affirmed by Lord Mansfield. See Cowp., 269, 270.

"Where a restraint appears to be of manifest benefit to the public, such is to be considered rather as a regulation than as a restraint." Willes, 388; 1 Str., 675; 2 Id., 1085; 3 Burr., 1328; 1 H. Bl., 370; 1 Roll. Abr., 365; 3 Salk., 76; Sid., 284; 2 Kyd. Corp., 149.

In *The Village of Buffalo* v. *Webster*, 10 Wend. (N. Y.), 101, Chief Justice Savage puts this case *ex gratia*. "A by-law that no meat should be sold in the village would be bad, being a general restraint; but that meat shall not be sold, except in a particular place, is good, not being a restraint of the right to sell meat, but a regulation of that right."

In the case of *The Commonwealth* v. *Abram Wolf*, 3 Serg. & R. (Pa.), 48, Chief Justice Tilghman affirmed the validity of an ordinance of Philadelphia, imposing a fine for working on a Sunday, against a Jew; though under the teachings of the Jewish Talmud and the Rabbinical Constitutions, the [*605 Jew deemed Saturday as the Jewish Sabbath, and felt it both as a privilege and a duty to labor for six days, and to rest on the seventh, or Saturday.

In the case of the *Mayor of New York* v. *Slack*, 3 Wheel. Cr. Cas., *et seq.*, the court affirmed the validity of an ordinance imposing penalties for burying the dead within three miles of the city limits, on the ground that the preservation of the public health was an incident of the corporate power. The opinion of the court is particularly referred to for the minuteness and learning with which it reviews the whole power of city corporations over matters of general police and sanitary regulation.

To the same end reference is also made to the ordinances of Boston, pp. 53, 55, 76; of Nashville, p. 60; the revised ordinances of Baltimore, (1838,) p. 285, for the act of assembly, conferring the power; and from p. 37 to 51, for the ordinances made under that authority; quarantine laws, &c.

So far as the legislative power of Louisiana, both territorial and state, could confer the power to make the ordinances in question, that power has been amply conferred. The 6th section of the act of the 17th February, 1806, provides that "the said council shall have the power to make and pass all by-laws and ordinances for the better government of the affairs of the said corporation, for regulating the police, and preserving the peace and good order of the said city;" so the act of the 14th March, 1816, provides "that the city council shall have power and authority to make and pass such by-laws and ordinances as they shall deem necessary to maintain the cleanness and salubrity of the said city, &c. And to make any other regulations which may contribute to the better administration of

the affairs of the said corporation, as well as for the maintenance of the police, tranquillity, and safety of the said city.

These acts were all in force at the time these ordinances were passed, and still are; and also the 4th section of an act of the 8th of March, 1836, which provides that "each of the municipalities, &c., shall possess generally all such rights, powers, and capacities as are usually incident to municipal corporations, &c., &c."

The power conferred on the council, then, is ample enough to sanction these ordinances; but it is material to know, whether the delegating power could rightfully do what it has thus done; and if it could not, whether it is the province, or within the competency of this court to say so? This brings us to the question:

4. Has this court jurisdiction in this case?

If it has, it does not derive it from the character of the parties, for they are all citizens of the same state; and not deriving it thence, the function of this court to administer state laws between certain classes of parties does not attach. The questions raised here, therefore, of the repugnancy of these ordinances to the laws of the state, or of the repugnancy of those laws to the state constitution, be such repugnancy what it may, it is most respectfully submitted, are *606] mere *municipal questions, upon which the judgment of the court, *a quo*, in the present conjuncture, is final and conclusive. If, indeed, there be a repugnancy between these ordinances and "the constitution, treaties, or laws of the United States," and their validity is "drawn in question" by the court's judgment, the jurisdiction is conceded.

1st. There is no repugnancy to the constitution, because no provision thereof forbids the enactment of law or ordinance, under state authority, in reference to religion. The limitation of power in the first amendment of the Constitution is upon Congress, and not the states.

2d. The provisions of the treaty of 1803 are *functæ officiorum*, with regard to that portion of "the ceded territory" which has been formed into states which have been admitted into the union. To that end the guarantees in behalf of the "inhabitants" were directed and confined, for no higher or other privileges were claimed or provided for them; and it is hence submitted, that when a state, formed out of that territory enters the union, the treaty, *quoad hoc*, has been executed, and has spent its force. The "inhabitants" of Louisiana have provided their own securities for their own rights in their own constitution, which they themselves have established; and the federal government has admitted her into the

union upon their own terms. They have absolved the government from its treaty dues to them, and the government has absolved itself from its treaty dues to France on their account.

3d. So much of the ordinance of 1787 as may have been extended to the people of the Orleans territory expired within the jurisdiction of Louisiana when she was admitted as a state into the union. That ordinance is older than the Constitution, but it cannot, to any extent, supersede it. The federal government possesses no powers but such as it has derived from the states; and no one state has conferred upon it, or can confer upon it, more or less power than any other state has conferred, or can confer. This results from the incapacity of the government to take, rather than from the incapacity of the states to give. Hence there is, and must be, from a constitutional necessity, a perfect and unchangeable equality among the states, not indeed in reference to the powers which they may separately exercise, (for that depends upon their own municipal constitutions,) but in reference to those which they separately retain. What Massachusetts may do, Louisiana may do. What Congress may not forbid Massachusetts to do, it may not forbid Louisiana to do. If Congress may not extend over Massachusetts the provisions of the ordinance of 1787, or any portions thereof, neither can it over Louisiana, or retain them there after Louisiana became Massachusetts's equal, and had the power to decide for herself. If they are retained there they derive their exclusive obligation and force from Louisiana's adoption, and not from the authority of Congress. They have thus become laws of Louisiana, and have ceased to be laws of *the United States. If they have so ceased to be laws of the [*607 United States, how could the imputed repugnancy between them and the city ordinances confer any jurisdiction upon this court? As laws of Louisiana, the judicial functionaries thither are the constitutional and final expounders in cases between her own citizens, like the one at bar.

The act of Congress of the 8th April, 1812, which admitted Louisiana into the union, acknowledged that very equality with her sovereign sisters, which is here asserted. The first section provides—"That the said state shall be one, and is hereby declared to be one, of the United States of America, and admitted into the union on an equal footing with the original states, in all respects whatever." It is not the mere assertion of her equality, in this clause, which establishes her equality—it only pronounces that equality which the Constitution establishes. If she be equal, however, she must be

equally exempt from the legislation of Congress, past or future, as her elder sisters. If the 1st article of the compact created by the ordinance of 1787, in these words, "No person demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship or religious sentiments," has been extended over Massachusetts by any act of Congress, and through its own proper vigor has the force of law, it binds Louisiana to the same extent, but no further, and not otherwise.

The learned counsel for the plaintiff in error have cited two decisions of this court—the one 5 Pet., 515, the other 9 Id., 285—to sustain their position upon this branch of the issues raised by the record; but it is presumed that there is some error in the references; for there is naught to be found at those pages applicable to the matter for which they are cited.

A case has also been cited from 1 McLean, 341, to maintain that the ordinance of 1787 survives the organization of a state government over territory to which it applies. That may be, in those new states which have been erected in the identical territory to which the compact contained in the ordinance relates. Nor is the authority understood as extending beyond that. The case arose in Ohio. It had reference especially to the free navigation of her waters, as secured to the other states by the compact, and it may be doubted if Ohio could have deprived them of that, though there had been no compact. The learned judge, in delivering his opinion, and in speaking of the ordinance, says:

"Many of the provisions were temporary in their nature, having for their object the organization and operation of a territorial government. Others assume the solemn form of a compact between the original states and the people and states in the territory which were to remain for ever unalterable, unless by common consent."

The portion of the ordinance thus deemed "unalterable," *608] could never have been made applicable to the "inhabitants" of the Orleans *territory, because there could have been no such "compact" made in reference to them; nor was it made. Indeed, other parts of the opinion seem to assail the position it was cited to support. At p. 343, the learned judge says:

"The change from a territorial government to that of a state necessarily abolished all those parts of the ordinance which gave a temporary organization to the government, and also such parts as were designed to produce a certain moral and political effect. Of the latter description were those provisions which secured the rights of conscience—which de-

clared that education should be encouraged, and excessive bail should not be required," &c.

What "provisions" of the ordinance "secured the rights of conscience," other than those forbidding a person to "be molested on account of his mode of worship, or religious sentiments," already quoted from the 1st article of the compact? The counsel of the plaintiff in error has made reference to no other "provisions," and it is believed there are none. Then we are furnished by the learned counsel with the high authority of Mr. Justice McLean, that these "provisions" are "necessarily abolished," by the erection of a territory, in which they apply, into a state government. And as this is true of a territory embraced within the very limits to which the compact originally referred, *à fortiori* must it be applicable to states formed out of territory *aliunde*.

It is believed that the opinion also sustains other views presented in the argument in behalf of the defendants in error, in the following passage:

"It may be admitted that any provision in the constitution of the state must annul any repugnant provision contained in the ordinance. This is within the terms of the compact. The people of the state formed the constitution, and it was sanctioned by Congress; so that there was the 'common consent' required by the compact to alter or annul it."

So, too, the constitution of Louisiana "was sanctioned by Congress." If there be a repugnancy between its provisions and those "provisions" of the ordinance referred to, those provisions are annulled, if not, then the state of Louisiana has retained them, and made them her own proper laws, and they are, in no just sense, since then, laws of the United States; for Congress is without capacity to make for her, or to extend over her sovereign domain, any laws of Congress upon that subject.

The defendants in error further rely on, and make reference to, the well-reasoned opinion of the judge, *a quo*, and the authorities cited therein.

Coxe, in reply, directed his attention chiefly to the other questions in the case than that of jurisdiction, and referred to the opening *argument of his colleague, Mr. *Read*, as a full exposition of the merits of the case. [*609

Mr. Justice CATRON delivered the opinion of the court.

As this case comes here on a writ of error to bring up the proceedings of a state court, before proceeding to examine the

merits of the controversy, it is our duty to determine whether this court has jurisdiction of the matter.

The ordinances complained of, must violate the Constitution or laws of the United States, or some authority exercised under them; if they do not, we have no power by the 25th section of the Judiciary Act to interfere. The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states. We must therefore look beyond the Constitution for the laws that are supposed to be violated, and on which our jurisdiction can be founded; these are the following acts of Congress. That of February 20, 1811, authorized the people of the territory of Orleans to form a constitution and state government; by sect. 3, certain restrictions were imposed in the form of instructions to the convention that might frame the constitution; such as that it should be republican; consistent with the Constitution of the United States; that it should contain the fundamental principles of civil and religious liberty; that it should secure the right of trial by jury in criminal cases, and the writ of *habeas corpus;* that the laws of the state should be published, and legislative and judicial proceedings be written and recorded in the language of the Constitution of the United States. Then follows by a second proviso, a stipulation reserving to the United States the property in the public lands, and their exemption from state taxation—with a declaration that the navigation of the Mississippi and its waters shall be common highways, &c.

By the act of April 8, 1812, Louisiana was admitted according to the mode prescribed by the act of 1811; Congress declared it should be on the conditions and terms contained in the 3d section of that act; which should be considered, deemed and taken, as fundamental conditions and terms upon which the state was incorporated in the union.

All Congress intended, was to declare in advance, to the people of the territory, the fundamental principles their constitution should contain; this was every way proper under the circumstances: the instrument having been duly formed, and presented, it was for the national legislature to judge whether it contained the proper principles, and to accept it if it did or reject it if it did not. Having accepted the constitution and admitted the state, "on an equal footing with the original states in all respects whatever," in express terms, by the act
*610] of 1812, Congress was concluded from assuming *that the instructions contained in the act of 1811 had not

been complied with. No fundamental principles could be added by way of amendment, as this would have been making part of the state constitution; if Congress could make it in part, it might, in the form of amendment, make it entire. The conditions and terms referred to in the act of 1812, could only relate to the stipulations contained in the second proviso of the act of 1811, involving rights of property and navigation; and in our opinion were not otherwise intended.

The principal stress of the argument for the plaintiff in error proceeded on the ordinance of 1787. The act of 1805, chap. 83, having provided, that from and after the establishment of the government of the Orleans territory, the inhabitants of the same should be entitled to enjoy all the rights, privileges, and advantages secured by said ordinance, and then enjoyed by the people of the Mississippi territory. It was also made the frame of government, with modifications.

In the ordinance, there are terms of compact declared to be thereby established, between the original states, and the people in the states afterwards to be formed north-west of the Ohio, unalterable, unless by common consent—one of which stipulations is, that "no person demeaning himself in a peaceable manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territory." For this provision is claimed the sanction of an unalterable law of Congress; and it is insisted the city ordinances above have violated it; and what the force of the ordinance is north of the Ohio, we do not pretend to say, as it is unnecessary for the purposes of this case. But as regards the state of Louisiana, it had no further force, after the adoption of the state constitution, than other acts of Congress organizing, in part, the territorial government of Orleans, and standing in connection with the ordinance of 1787. So far as they conferred political rights, and secured civil and religious liberties, (which are political rights,) the laws of Congress were all superseded by the state constitution; nor is any part of them in force, unless they were adopted by the constitution of Louisiana, as laws of the state. It is not possible to maintain that the United States hold in trust, by force of the ordinance, for the people of Louisiana, all the great elemental principles, or any one of them, contained in the ordinance, and secured to the people of the Orleans territory, during its existence. It follows, no repugnance could arise between the ordinance of 1787 and an act of the legislature of Louisiana, or a city regulation founded on such act; and therefore this court has no jurisdiction on the last ground assumed, more than on the preceding ones. In our judgment, the question presented by

the record is exclusively of state cognizance, and equally so in the old states and the new ones; and that the writ of error must be dismissed.

*611] *JOSEPH CHAIRES, EX'R OF BENJAMIN CHAIRES, DECEASED, AND PETER MIRANDA AND GAD HUMPHREYS, APPELLANTS, *v.* THE UNITED STATES.

Where this court has affirmed the title to lands in Florida, and referred, in its decree, to a particular survey, it would not be proper for the court below to open the case for a re-hearing, for the purpose of adopting another survey. The court below can only execute the mandate of this court. It has no authority to disturb the decree, and can only settle what remains to be done.[1]

THIS was an appeal from the Superior Court of East Florida, and a sequel to the case reported in 10 Peters, 308.

The appellants filed in the court below the following petition:

"To the Honorable Isaac H. Bronson, judge of the Superior Court in and for the eastern district of Florida.

"The petition of Joseph Chaires, of the said territory, executor of the last will and testament of Benjamin Chaires, late of the same territory, but now deceased, Peter Miranda, and Gad Humphreys, respectfully showeth:

"That the said Benjamin Chaires, Peter Miranda, and Gad Humphreys, heretofore, to wit, on the 11th day of May, which was in the year of our Lord one thousand eight hundred and twenty-nine, filed their petition in the office of the clerk of this honorable court in terms of an act of Congress of the United States, entitled an act supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida, approved on the 28d of May, in the

[1] CITED. *Tyler* v. *Magwire*, 17 Wall., 288.

Where the Supreme Court sent a mandate to a Circuit Court, directing it to put a party into possession of certain lands, which were the subject of an ejectment suit, it was held right in that court not to extend the possession farther than the land originally recovered in ejectment, although other lands were afterwards drawn into the controversy. *Walden* v. *Bodley*, 9 How., 34. The lower court is bound to follow the instructions given to it by the mandate, yet if the mandate is plainly framed, as regards a minor point, on a supposition which is proven to be without base, the mandate must not be so followed as to work manifest injustice. It must be construed reasonably. *Milwaukee, &c., R. R. Co.* v. *Soulter*, 2 Wall., 510.

year one thousand eight hundred and twenty-eight, praying for the confirmation of certain claims to lands therein specified, and founded on a title made and granted by his excellency Don José Coppinger, lieutenant-colonel of the royal armies of Spain, civil and military governor of the territory of Florida, then subject and belonging to his Catholic Majesty, the King of Spain, and chief of the royal exchequer of the city of St. Augustine, Florida, to José de la Maza Arredondo.

"That the attorney of the United States in and for said district, duly appeared, and answered the said petition; and thereupon such proceedings were had in the said court, that afterwards, on the 24th day of November, in the year of our Lord one thousand eight hundred and thirty-four, a decree was rendered therein in favor of the petitioners; and the said court did thereupon order, adjudge, and decree, that the claim of the said petitioner was valid, and that, in accordance with the laws and customs of Spain, and under and by virtue of the treaty of amity, settlement, and limits, between the United States and Spain, ratified by the President of the United States on the 22d day of February, one thousand eight hundred and twenty-one, and under and by virtue of the laws of nations and of the United States, the said claim was thereby confirmed, adjudged, *and decreed, unto the said [*612
claimant, to the extent, for the number of acres, and at the place specified in the grant for the said land, to José de la Maza Arredondo; and as in the certificate and plat of the same, made by Andres Burgevin, dated the 14th of September, in the year of our Lord one thousand eight hundred and nineteen, and fully in the said cause is set forth, that is to say—

"A piece of land, which contains twenty thousand acres, situated on both margins of a creek, known as Alligator creek, said land commencing a little above the head of said creek, and embracing an Indian town, distant about eighty miles from the port of Buena Vista, and about forty miles to the north-west of Payne's Town—its first line running north twenty degrees west, three hundred and fifty-seven chains, begins at a pine marked X, and ends at another marked A; the second line running south seventy degrees west, five hundred and sixty chains, and ending at a stake; the third line running south twenty degrees east, three hundred and fifty-seven chains, and ending at a pine marked II; and the fourth line running north seventy degrees east, five hundred and sixty chains.

"That an appeal was taken from the decree, so rendered in

this honorable court, to the Supreme Court of the United States, by the attorney of the said United States, in and for the said territory, and such proceedings were thereupon had in the said Supreme Court, that afterwards, on the day of , in the year of our Lord one thousand eight hundred and thirty-six, the decree of this honorable court was affirmed; and thereupon the mandate of the said Supreme Court was awarded, directing the same to be carried into effect.

"And your petitioner further shows to your honor, that upon application to the proper officer of the United States, to carry the said decree into effect, by admeasuring to your petitioner the lands specified in the grant, it appears that there is error in rendering the said decree, and that the same requires to be reformed, in this—

"That in and by the decree of this honorable court, hereinbefore alleged and affirmed, in manner hereinbefore set forth by the Supreme Court, your petitioner's claim was confirmed, adjudged, and decreed to be valid 'to the extent, for the number of acres, and at the place as in the grant to the said land to José de la Maza Arredondo,' but it is added in the said decree, 'and as in the certificate and plat of survey of the same, made by Don Andres Burgevin, and dated the 14th September, one thousand eight hundred and nineteen, and filed herein, is set forth, to wit,' &c., &c.; and the said decree thereafter proceeds to recite the metes and bounds as specified and set forth in the survey made by the said Don Andres Burgevin.

"That the land granted to José de la Maza Arredondo, and, in the decree before referred to, confirmed and adjudged to
*613] your petitioner, is described in the royal grant or title to property, also before *herein referred to, consist of 'twenty thousand acres of land, with title of absolute property, of those known as Alachua, about eighty miles distant from this city (of St. Augustine) at a place known as "Big Hammock," about twenty miles from the river Lawanee westward, about sixty miles from St. Johns.' While the land specified in the survey of Don Andres Burgevin is described as follows: 'twenty thousand acres of land, situated on both margins of a creek known as Alligator creek. Said land commences a little above the head of said creek, and embraces an Indian town, distant about eighty miles from the post at Buena Vista, and about forty to the north-west of Payne's Town,' &c., &c.

"That the land specified in the said survey does not conform to, or correspond with, the land described in the said grant, and that the surveyor-general of the United States has

therefore been unable to execute the decree of this honorable court, affirmed as aforesaid by the Supreme Court of the United States, and to admeasure to your petitioner the land adjudged to him by the said decree.

"That forasmuch as the land specified in the said grant to José de la Maza Arredondo is, by the decree aforesaid, adjudged to your petitioner, 'to the extent, for the number of acres, and at the place, as in the grant for said land,' your petitioner is entitled to have the same admeasured to him according to the terms of the said grant, and the description therein contained; and that if the said survey of Don Andres Burgevin conflicts with the said grant, the said survey must yield to, and be controlled by, the terms of the grant.

"Your petitioner further shows to your honor, that the said land was duly surveyed and admeasured, and a plat thereof made and returned to this honorable court, and given in evidence in said cause, by Joshua A. Coffee, a competent and qualified surveyor, but that the same was omitted in the transcript of the record sent to the Supreme Court of the United States, although the fact of its having been given in evidence appears in the said transcript, a copy of which said survey is hereunto annexed.

"Your petitioner further shows to your honor, that the surveyor-general of the United States hath refused to execute the said decree by admeasuring for your petitioner the land thereby confirmed and adjudged to him, and that, upon application to the commissioner of the General Land-office, he hath in like manner refused so to do, until the said decree shall have been reformed by the competent authority.

"Wherefore, your petitioner prays this honorable court, the premises aforesaid being considered, and due proof thereof being made, that the said decree may be reformed, and to that end, that a rehearing of the said cause in this behalf may be granted; that the title of your petitioner to the twenty thousand acres of land, specified in the grant to José de la Maza Arredondo may be adjudged to your petitioner according to the terms and specifications of the said grant, *and [*614 the survey of the said Joshua A. Coffee, a copy whereof is hereunto filed; or according to a survey to be made under the order of this court, by the surveyor-general of the territory of Florida, in conformity to the description of the said land in the said grant specified and set forth, to be returned into the registry of this honorable court; and that he may have such other and further relief, as in the wisdom of this honorable court shall seem meet and right in the premises; and your petitioner, &c., &c., &c."

In June, 1844, the court, after hearing an argument, decided that the petition for rehearing could not be entertained, and ordered it to be dismissed.

From this decree the petitioners appealed to this court.

Berrien, for the appellants.
Nelson, (attorney-general,) for the United States.

Berrien, after stating the case, said: This petition was dismissed by the District Court, on the ground that it had not been filed in time.

The relief sought by the petitioner is therefore resisted solely on the ground that too much time has elapsed since the decree was rendered, to entitle them to it.

They have the decree of this court affirming their title to twenty thousand acres of land, specified in their grant, and at the place therein specified.

The ministerial officer of the government refuses to admeasure the land so awarded to them, according to the terms of the grant, because the decree also refers to an inconsistent description contained in the survey of Burgevin.

And an application to have the decree reformed, according to the clear and manifest intent of the court, is resisted on the ground of time.

This objection is sustained by a reference to the rules established in the English courts of chancery, and recognised here in cases to which they apply, in relation to applications for a rehearing, and bills of revivor.

And to the argument from analogy, drawn from the limitation of time in our statute, within which appeals may be entered, and writs of error sued out.

As to the first objection: it is submitted that the rules which regulate the proceedings of courts of chancery, in the exercise of their general jurisdiction over cases, between individual parties, are not applicable to this proceeding.

This case was brought before the court below, and subsequently transferred to this court, not by an appeal to the general chancery jurisdiction of either, but under the special authority given to these courts by the act of 1828, providing for the settlement and confirmation of private land claims in Florida, and those other acts to which it refers.

*615] The proceeding was by petition; which was required to be conducted *according to the rules of a court of equity; and certain limitations of time were prescribed, within which petitions were to be filed, and appeals to be entered.

But the court was required to settle and determine the

validity of the title, by a final decree, and the successful claimant was entitled to a copy of the decree, and the admeasurement by the surveyor-general of the land awarded, with a certificate of such admeasurement, for the purpose of obtaining a patent from the commissioner of the General Land-office.

No time is specified within which the duties of these officers are to be respectively performed.

But in the case of a successful claimant, their acts constitute part of the *res gesta*. They are part of the proceeding; and the District Court must, in such case, retain possession of the cause, until the mandate of this court is carried into execution.

Its intervention may, in various ways, be necessary to direct, or speed the action of the ministerial officers of the United States.

Neither the enrolment of the decree in this court, nor of the mandate in the court below, can conclude the cause, and fix a period from which the time for filing a petition for a rehearing, or bill of revivor, is to run.

The case remains open, always liable to be acted on by the court below, until the mandate is executed.

No time is prescribed by the act, within which the duties of the surveyor-general are to be performed. The nature of these duties forbade it. It was to survey wild lands in trackless forests.

In point of fact, the decision of the surveyor-general, and of the commissioner of the General Land-office, that this decree, in its present form, could not be executed, was only obtained immediately before the application to the court below.

If they erred in that decision, had not the District Court power, in the exercise of its authority, to carry the mandate of this court into execution to correct that error, and to require the survey to be made according to its interpretation of the decree? That was one of the prayers of the petitioners.

No application could be made here. The case had passed from this court with its mandate.

It remained with the court below to superintend the execution of the mandate; and must therefore have remained open in that court.

That which is here contended is, that neither the time at which the decree is pronounced, in this court, nor that when the mandate is filed in the court below, can be considered as the starting point, from which the limitation applicable to petitions for rehearing, and bills of revivor, is to be computed.

This seems to result inevitably from the mode of proceeding.

The decree of this court is spoken of. But the proceeding here is but an affirmance of the decree of the court below.

*616] *The mandate is the certificate of that affirmance, and the case is remanded to the District Court for "such further proceedings," as according to right and justice, and the laws of the United States, ought to be had. It is then necessarily open in that court.

It may do whatever "right and justice," and "the laws of the United States," require to be done.

Here it is obvious that this application is founded on such matter.

The impossibility of reconciling the different parts of this decree, so as to give it effect, could only be ascertained (from the vagueness of this, as of all other Spanish grants,) by the experimental surveys of the United States officer.

This suggestion withdraws the case at bar from the authority of that of Thomas and Brockenborough, and of the rules of the English chancery.

Repeated experimental surveys were necessary, for the purpose of ascertaining whether the lines of surveys lying in the supposed vicinity of those specified in this grant would correspond with those of the survey referred to in the decree. It was only when this had been done, that the impossibility of carrying this decree into effect, without abandoning the lines of the survey of Burgevin, and resorting to those in the grant, and the survey of Coffee, could be ascertained.

No laches can be imputed to the petitioners, because the time which has since elapsed is not within any legal or equitable limitation.

The ground upon which, however, it is apprehended that this case ought to be put is, that this case was still open in the court below for the purpose of this petition.

The petitioners had a final decree in their favor, as ascertaining their title to twenty thousand acres.

As they were required to do, they applied to the surveyor to admeasure their land to them.

This, after repeated efforts, in a wild country, he failed to do, alleging certain errors in the decree.

When this was ascertained, application was made to the court below, so to reform the decree as to give the petitioners the benefit of it in some form.

This was refused, solely on the ground that such petition could not now be received.

If, therefore, this cause is open for any purpose, in the District Court, as we apprehend all such cases must be, while the surveyor is engaged in making the survey, in obedience to the

mandate; if that court could have granted relief in any form, upon petition, to the appellants, then we suppose that its judgment must be reversed, as the petition contains a prayer for general relief.

Nelson's argument was this:

This is an appeal from the decision of the Superior Court of the *district of East Florida, rendered on a [*617 petition exhibited in said court by the appellants, praying for certain relief, and which was dismissed by said court. The error alleged is, that the decree of dismissal was improvidently passed.

The petition is spread upon the record, and need not be repeated here.

It is sufficient to state, that it seeks to reform a decree of the court to which it was presented, passed on the 24th day of November, 1834, and which was, at the January term, 1836, of this court, upon an appeal prosecuted by the United States, affirmed. 10 Pet., 308.

The object sought to be effectuated is to make the decree available for other lands than those covered by it, under an allegation that the recitals in said decree are erroneous, and this it is proposed to do by the instrumentality of the petition set out in the record.

The appellee maintains that the court below, in dismissing the petition, committed no error, and that the same ought not to have been entertained by it, because of the lapse of time from the rendition of the decree proposed to be reformed, to the exhibition of the petition in this case.

The proceedings in the court of Florida were had in pursuance of the provisions of the act of Congress of the 23d of May, 1828, entitled "An act supplementary to the several acts providing for the settlement and confirmation of private land-claims in Florida," the 6th section of which provides that "all claims, &c., shall be received and adjudicated by the judge of the Superior Court in which the land lies, upon the petition of the claimant, according to the forms, rules, regulations, conditions, restrictions, and limitations, prescribed to the district judge, and claimants in the state of Missouri, by act of Congress, approved May 26th, 1824, entitled 'An act enabling the claimants to lands, within the limits of the state of Missouri and territory of Arkansas, to institute proceedings to try the validity of their claims.'"

The 2d section of the act last referred to declares, "that every petition, which shall be presented, under the provisions

of this act, shall be conducted according to the rules of a court of equity."

The question then to be decided is, in the view entertained by the appellees, whether, according to those rules, the petition for a rehearing, filed in this case, was in time to justify the court below in opening the original decree?

This was passed on the 24th day of November, 1834, and was affirmed in this court in January, 1836, and the present petition was filed on the 21st day of May, 1844.

A rehearing will not be granted, if once the decree has been enrolled, even if only one of several defendants has caused the enrolment. 1 Sch. & L., 234.

*618] Whatever may be the capacity of a bill of revivor or review, to *open a decree thus enrolled, a petition for a rehearing is incompetent to such an end. *Bennett* v. *Werter*, 2 Johns. (N. Y.) Ch., 305, 3 Ch. Rep., 94.

But in this case, the lapse of time, in analogy to the principles of law applicable to limitations, is a bar to any relief under this petition, if not, indeed, under any form of proceeding. 10 Wheat., 146; 8 Pet., 123.

The 22d section of the Judiciary Act of September 24, 1789, limits writs of error and appeal to five years. 1 Story Laws, 60; 2 Id., 905, 906, § 5; *McClung* v. *Silliman*, Wheat., 598.

Appeals in cases arising under the act of 1828, are governed by the 7th and 9th sections thereof.

And the 12th section provides, that claims not brought or prosecuted to final decision within two years shall be barred.

Besides, in this case, a mandate had been sent down from the Supreme Court to the Superior Court of Florida; and after a mandate, no rehearing will be granted. *Sibbald* v. *The United States*, 12 Pet., 492.

It is a mistake to suppose, that the object of this petition was to operate upon a ministerial officer, the surveyor-general, in the execution of the decree of the court; its purpose was to reform the decree itself, and to assert, substantially, a new claim. This, it is respectfully insisted, it is not competent for the appellants to do in the form they have adopted.

Mr Justice CATRON delivered the opinion of the court.

On the facts presented, one consideration is whether the petition was dismissed for a proper reason. The petition was moved on by the claimant's counsel—and resisted on the ground that it had not been filed within the time allowed by law, and the rules of the court: and it is insisted it was dismissed for this reason, which is insufficient; as the bar of five

years cannot be interposed under the circumstances. If this had been the reason given, it would be immaterial, if the order was proper for other reasons. The 32d section of the Judiciary Act prescribes the duty of this court in such cases, and directs it to proceed and give judgment according to the right of the cause, and matter in law, without regard to any imperfections in the judgment.

But we do not apprehend any imperfection to exist; the court says—"It is considered that a petition for a rehearing cannot now be entertained by this court, in this cause." And why not? In 1829, a proceeding was instituted in the Superior Court of East Florida by the claimants for the confirmation of a claim for twenty thousand acres of land granted to Arredondo: In 1830 that court declared the title valid, on the face of the title-papers; this fact existing, the next presented for ascertainment was the sufficiency of the description as to the general locality of the land granted. But the duties [*619 of the *court did not end here; by the 2d section of the act of 1824 it was not only given full power and authority to hear and determine all questions arising in the cause relative to the validity of the title, and the descriptive identity of location on the face of the title; but thirdly to settle the precise boundaries of the land on the ground; founding its decree on an existing survey, if a proper one was produced, and if not, to let the party proceed according to the 6th section of the act. On the face of the title no material difficulty seems to have arisen; but to identify the land called for was most difficult, and probably impossible: If the grant had been unaided by a survey, it cannot well be perceived how it could have escaped from the principles on which were rejected the claims of Forbes, Buyck, and Joseph Delespine, (found in 15 Pet.,) and of Miranda, (in 16 Pet.) To avoid doing so, the land was decreed by metes and line-marks, founded on a survey (purporting to have been made for the land granted) by Don Andres Burgevin on the 14th of September, 1819.

This survey, it is contended, is for land lying in a different locality from that referred to in the grant, and being so, it is urged, that according to the rulings of this court, no survey could be made for any other land than that granted after the 24th of January, 1818; as this would in effect be a new grant, which the treaty prohibited after that date, according to the cases of *Clarke* and *Huertas*, in 8 and 9 Pet., and that of *Forbes*, 15 Id., 182; and there being no equivalent provided in the grant to except the case from these principles, the survey could not legally be the basis of a decree.

This may have been true, and the decree for the land con-

tained in Burgevin's survey erroneous; but the question is, whether the court below had any power to correct it? If it had not, then no petition for such purpose could be heard, either on the part of the United States, or the claimants in that court.

From the decree made in 1830, an appeal was prosecuted by the United States to this court; the claimants rested content, and prosecuted no cross appeal. 10 Pet., 308. On a hearing, the decree below was affirmed for the specific land, and the cause remanded for further proceedings, to the end that a patent might issue, pursuant to the 6th section of the act of 1824, which declares it shall be for the land "specified in the decree;" and prohibits a survey for any other land, unless that decreed has been disposed of, when a change is authorized by the 11th section; but as no other appropriation of the land set forth in the decree is alleged to exist, this circumstance is out of the present case.

The claimants not being willing to take the land in Burgevin's survey, assumed the right to have a re-survey made, or to have adopted that made by Joshua A. Coffee, on their behalf, in 1834, which they allege is at the place called for in the grant; and this on the ground that the decree of 1830 is inconsistent, it being in confirmation of the land granted, and also of Burgevin's survey—*the places not being the same. This change was refused at the land-office here, for the reason that the decree excluded such a change until it was altered by the proper judicial authority. For this purpose the petition for a re-hearing was filed, seeking to have the decree of 1830 reformed, and that part of it establishing locality and boundaries set aside or disregarded, and the land located elsewhere. This the Superior Court of East Florida had no power to do, on the facts set forth by the petition, because the decree of this court, made in affirmance of that made below, is conclusive on the inferior court; and it has no authority to disturb it by the mode proposed, but can only execute our mandate, and settle so much as remains to be done. For the principle, governing in like cases, we refer to the *ex parte* application of Sibbald, and the rules there laid down, (12 Pet., 489, 490,) to which nothing need be added; as they are altogether adverse to the present proceeding, and show that the petition was properly dismissed.

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THE UNITED STATES, APPELLANTS, *v.* WILLIAM MARVIN.

The act of the 26th of May, 1830, providing for the final settlement of land claims in Florida, must be construed to contain the same limitation of time within which claims were to be presented as that provided by the act of 23d of May, 1828.

That limitation was one year. The courts of Florida, therefore, had no right to receive a petition for the confirmation of an incomplete concession after the 26th of May, 1831.

The case in 15 Peters, 319, examined and distinguished from the present.

THIS was an appeal from the Superior Court for the district of East Florida.

It was a land claim, and as the opinion of the court turned entirely upon the question, whether or not the claim was filed in time in the court below, it is only necessary to state the circumstances which bear upon that point.

On the 23d of May, 1828, (1 Land Laws, 439,) Congress passed an act, the 12th section of which was as follows:

"That any claims to lands, tenements, and hereditaments, within the purview of this act, which shall not be brought by petition before said court within one year from the passage of this act, or which, being brought before said court, shall, on account of the neglect or delay of the claimant, not be prosecuted to a final decision within two years, shall be forever barred, both at law and in equity; and no other action at common law, or proceeding in equity, shall ever thereafter be sustained in any court whatever."

On the 26th of May, 1830, another act was passed, [*621
(1 Land *Laws, 466,) providing for the final settlement of land claims in Florida. It confirmed certain claims under a league square, which had been recommended for confirmation by the register and receiver of the land-office, acting as commissioners in the district of East Florida, and then proceeded to enact by the 4th section, as follows:

"That all the remaining claims which have been presented according to law, and not finally acted upon, shall be adjudicated and finally settled upon the same conditions, restrictions, and limitations, in every respect, as are prescribed by the act of Congress, approved 23d May, 1828, entitled "An act supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida."

On the 17th of June, 1843, Marvin filed in the clerk's office of the Superior Court for the district of East Florida, a petition, claiming title to seven thousand acres of land which had

been granted to Bernardo Segui, in the year 1815, by Estrada, then the Governor of East Florida. He further stated that the claim had been presented to the commissioners, recommended by them to Congress for confirmation, and confirmed by Congress to the extent of one league square, by the act of May 23, 1828.

An answer being filed on behalf of the United States, and sundry matters being given in evidence by the petitioner, the cause came on for trial, when the court decided that by the act of Congress of May 26, 1830, the claimant was not bound to file his petition within one year from the passage of said act, and then proceeded to decree in favor of the claim.

From this decree the United States appealed to this court.

The cause was argued by Mr. Nelson, (attorney-general,) on behalf of the United States, and by Mr. Marvin, for the defendant in error.

Mr. Nelson referred to the acts of Congress above cited, and said that the question under this head was, whether the limitation of time prescribed by the act of 1828 was continued by the act of 1830. The case in 15 Pet., 319, was relied upon by the other side, and was the foundation of the opinion given by the court below. But the point did not arise in that case, because there a petition had been filed in time. In all other land laws there was a limitation, because the policy of the government was to have all land claims settled within a given time.

Marvin argued in the following manner.

The petition in this case was filed June 17, 1843, and the only point of any difficulty in the case, and the only one argued in the court below, is, whether the petition was filed in proper time.

The correct decision of this question depends upon the construction to be given to the 4th section of the act of Congress *622] of May 26, *1830, entitled "An act to provide for the final settlement of land claims in Florida," and to the 12th section of the act of May 23d, 1828, entitled "An act supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida."

By the 4th section of the act of May 26, 1830, it is provided, that "all the remaining claims which have been presented according to law, and not finally acted upon, shall be adjudicated and finally settled, upon the same conditions, restrictions, and limitations as are prescribed in the act of 1828."

This claim had been presented, according to law, to the land commissioners, and by them presented to Congress, and recommended for confirmation. It remained to be finally settled, Congress confirming only to the extent of one league square.

The point of difficulty, if any, is in the true meaning of the words "conditions, restrictions, and limitations." These words do not necessarily mean a limitation as to time. By the 12th section of the act of May, 1828, claims were to be brought by petition before the court, within one year thereafter, i. e. by May 23d, 1829, and prosecuted to final decision in two years, i. e. by May 23d, 1830. Yet the Congress says, May 26, 1830, more than two years afterward, that the remaining claims shall be adjudicated upon the same limitations, &c., as in the act of 1828, which would be impossible, if these words included the idea of time; for the time to file the petition, and even for final decision, had already expired, and no proceedings could be had. But the Congress intended, by the 4th section of the act of 1830, that the proceedings should be had for a final settlement. The title of the act is, "to provide for a final settlement," &c. These words then cannot intend a limitation as to the time of commencing proceedings, but mean those various conditions, restrictions, and limitations, in regard to the practice, course of proceedings, &c., &c., required by the act of 1828, and the Missouri act upon the same subject.

This point was argued in the case of the *United States* v. *Delespine*, 15 Pet., 319, and the court says, there "is no direct limitation in the act of 1830." Will the court imply a limitation as to time in this highly remedial statute, and by such implication defeat a final settlement of these land claims, to effect which was the object of passing the act, and in which both parties are interested; and that, too, in a case where the minority of heirs repels any imputation of laches on the part of the claimants? Justice and public policy are both against any such implication.

Mr. Justice CATRON delivered the opinion of the court.

This is an appeal from a decree rendered by the Superior Court of the district of East Florida, by which it was adjudged that no limitation existed to the filing for adjudication a claim for land under the acts of 23d May, 1828, and of 26th May, 1830.

*The petition to the Superior Court of Florida was filed in 1843 by Marvin, to have confirmed to him [*623

seven thousand acres of land on the river St. Johns, by a concession in the first form made in favor of Don Bernardo Segui, on the 20th December, 1815, by Governor Estrado: and the first question presented below was, and is here, had the Superior Court jurisdiction to entertain the cause? That court having adjudged that the act of 1830 had no limitation in it, and our conclusion being to the contrary, we will briefly state our reasons for reversing the decree and for ordering the petition to be dismissed.

The first act conferring jurisdiction on certain courts of the United States, to adjudge titles to land of the foregoing description, was that of May 26, 1824, and applicable to lands lying within the state of Missouri and territory of Arkansas. By the 5th section of that act it was declared, that all claims within its purview should be brought by petition before the District Court within two years from the passing of the act; and when so brought before the court, if the claimant, by his own neglect or delay, failed to prosecute the cause to final decision within three years, he should be forever barred, both at law and in equity; and that no other action at common law, or proceeding in equity should ever thereafter be sustained, in any court whatever in relation to said claims.

By the act of 1828, sect. 6, the provisions of the act of 1824 were extended to the Superior Court of Florida, with some modifications; and among others by sect. 12, that any claims to lands within the purview of that act which should not be brought by petition before the proper court within one year from the passing of the act; or which, being brought before the court, should not on account of the neglect or delay of the claimant, be prosecuted to a final decision within two years, should be forever barred; and that no action at common law or in equity should ever thereafter be sustained in any court whatever. And by sect. 13, the decree was to be conclusive between the United States and the claimant.

The act of 1830, in its 1st, 2d, and 3d sections, confirms various claims; and in the 4th section declares, that all the remaining claims which had been presented according to law to certain boards of commissioners referred to in the previous sections, and not finally acted on by Congress, should be adjudicated and finally settled upon the same conditions, restrictions and limitations, in every respect, "as are prescribed by the act of Congress approved May 23, 1828, entitled an act supplementary to the several acts providing for the settlement and confirmation of private land claims in Florida." The last law of 1830 is also entitled an act to provide for the same

purpose: It is supplementary to, and in effect re-enacts the law of 1828; carrying with it the entire provisions of the previous statutes, save in so far as previous parts of them were modified by subsequent conflicting provisions. The policy of Congress *was to settle the claims in as short a time as [*624 practicable, so as to enable the government to sell the public lands; which could not be done with propriety until the private claims were ascertained. As these were many in number, and for large quantities, no choice was left to the government but their speedy settlement, and severance from the public domain; such has been its anxious policy throughout, as appears from almost every law passed on the subject. In 1828 the time for filing petitions before the courts was even reduced from two years to one, and a positive bar interposed in case of failure. This policy we think Congress intended to maintain, and that the courts of Florida had no jurisdiction to receive a petition for the confirmation of an incomplete concession like the one before us, after the 26th of May, 1831.

Some stress has been placed on the language employed by this court in *Delespine's case*, 15 Pet., 329; and on which it is supposed the court below founded its decree on the head of jurisdiction. There an amended petition had been filed after the expiration of a year from the 26th of May, 1831, and the question was whether the defective petition, filed in time, had saved the bar, and it was held that it had. But so far from holding that no bar existed, the contrary is rather to be inferred; the direct question was neither decided or intended to be.

For the reasons stated, we order the decree of the Superior Court of East Florida to be reversed, and direct that the appellees' petition be dismissed.

LLEWELLYN PRICE, JUN., FOR THE USE OF DANIEL W. GAULLEY, PLAINTIFF IN ERROR, *v.* MARTHA A. SESSIONS.

Where a testator devised certain property to his infant daughter, to be delivered over to her when she should arrive at the age of eighteen years, and the daughter, at the age of sixteen, married the executor who had the principal management of the estate, and possession of the property devised, he must be considered as holding it as executor, and not as husband.

The executors had no power to deliver the property to the daughter, or to her guardian, or to her husband, before the happening of the contingency mentioned in the will.

The law of the state of Mississippi, providing that a wife should retain such property in her own right, notwithstanding her coverture, having gone into

operation before the daughter arrived at the age of eighteen years, the distribution to her must be considered to have been made under that law.[1] The property, therefore, cannot be responsible for the husband's debts.[2]

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the southern district of Mississippi.

The facts were these:

*625] In June, 1836, Russell Smith died, leaving a will, the second section *of which directed that his just debts and funeral expenses be paid, and that, for this purpose, the force be kept together on his plantation, Sylvan Vale, and prudently managed until that crop, or the subsequent one, should yield a fund to pay said debts.

The third section bequeathed to his step-son, William D. Griffin, four quarter-sections of land, and seventeen slaves; and continued as follows: "which property is to be delivered to the said William D. Griffin, by my executors, when he shall arrive at the age of twenty-one years; and should he, the said William D. Griffin, die before he arrives at the age of twenty-one years, then, and in that event, the aforesaid property, real and personal, is to be equally divided between my dear beloved brothers-in-law, E. J. Sessions, P. W. Defrance, W. Le Defrance, and Charles A. Defrance, provided they be living; if not, then it is to revert to my estate again, to be disposed of as hereinafter provided.

"4thly. I give and bequeath unto my dear beloved daughter, Martha Ann Smith, all the remaining balance of my estate, real and personal, not mentioned in my bequest to William D. Griffin, and should he and the others before-mentioned, to whom the said legacy was to descend, all be dead, she is also to inherit it, the said legacy to W. D. Griffin; but, at all events, the property is to be kept together, and the force worked on the plantation, until my said daughter, Martha

[1] The executor married the heiress in 1838, and the act referred to took effect in 1839. It was therefore by the mere force of the will that he was prevented from taking the property at the date of his marriage with his wife. The executor was the custodian of the property under the will; and the same would be the case if the property was to have been held by a person to be appointed by court, or a guardian. The general rule is, however, (aside from a statute) that the husband upon marrying an infant is entitled to all her personal property. *Shelley* v. *Westbrook*, Jac., 467; *Whitfield* v. *Hales*, 12 Ves., 492; *Kettletas* v. *Gardner*, 1 Paige (N. Y.), 488; *Brick's Estate*, 15 Abb. (N. Y.) Pr., 12; *Holmes* v. *Field*, 12 Ill., 424; *Shutt* v. *Carloss*, 1 Ired. (N. C.), Eq., 232; *Burr* v. *Wilson*, 18 Tex., 367; *Posch* v. *Frier*, 3 Harr. (N. J.), 204. Before taking possession of the property, the husband should make a motion in the court appointing the guardian to have the property turned over to him, which will be granted as a matter of course. *In re Whittaker*, 4 Johns. (N. Y.) Ch., 378.

[2] See *Paige* v. *Sessions*, 4 How., 122.

Ann, arrives at the age of eighteen years, at which time my executors are to deliver over to her all of the property first set apart for her, and still retain the possession of the legacy to W. D. Griffin, and not deliver it to her, if he lives until he is twenty-one years of age; and if he dies, the mode is pointed out for them to pursue. But should my said daughter, Martha Ann, die before she arrives at the age of eighteen, or has an heir of her own body, then the legacy left her, as also that may descend to her from the first legacy, (to W. D. Griffin,) is to be disposed of as follows, to wit:" &c., &c.

He further appointed E. J. Sessions, P. W. Defrance, John Lane, and George Selser, executors; and John Lane, guardian to his daughter, Martha, the defendant in error in the present suit, who was, at that time, about fourteen years of age.

On the 25th of July, 1836, the will was admitted to probate, and letters testamentary were granted to three of the executors, viz., Sessions, Lane, and Selser; and Lane was also appointed guardian to the child.

On the 8th of May, 1838, Sessions, together with Samuel Fernandis, and H. Fernandis, executed to Price, the plaintiff in error, two promissory notes; one payable eight months after the 1st of May, 1838, for $2345.11, and the other payable twelve months after the 1st of May, 1838, for $2401.16; both being negotiable and payable at the office of the Planters' Bank, Vicksburg, Mississippi.

In September, 1838, Sessions, one of the executors, married Martha, *the daughter of the testator, she being, at that time, about sixteen years of age. [*626

In August, 1839, Price, a citizen of the republic of Texas, and suing for the use of Gaulley, a citizen of the state of New York, brought suit against the three makers of the notes aforesaid, in the Circuit Court of the United States.

At November term, 1839, he obtained a judgment against the whole three, and in December following issued a *fieri facias* upon the judgment.

The property levied upon was suffered to remain in the hands of the possessors, upon their executing a forthcoming bond.

In 1839, the legislature of Mississippi passed an act, (Acts, 72,) the 22d and 23d sections of which were as follows:

"Sect. 22. Any married woman may become seised or possessed of any property, real or personal, by direct bequest, demise, gift, purchase, or distribution, in her own name, and as of her own property; provided, the same does not come from her husband after coverture.

"Sect. 23. Hereafter, when any woman, possessed of a pro-

perty in slaves, shall marry, her property in such slaves, and their natural increase, shall continue to her, notwithstanding her coverture; and she shall have, hold, and possess, the same, as her separate property, exempt from any liability for the debts or contracts of the husband."

The 24th section gave to a woman who became entitled to slaves, during coverture, the same right which the preceding section gave to those women who possessed slaves at the time of marriage.

In January, 1840, Sessions and wife executed two mortgages; one to the Commercial and Railroad Bank of Vicksburg, of land and negroes, to secure $21,661.19, and the other to the Planters' Bank, of other land and negroes, to secure $7121.20.

In May, 1840, the forthcoming bond, already spoken of, was forfeited, the effect of which was equivalent to a judgment against principal and sureties, for debt, interest, and costs.

On the 23d of November, 1840, the executors of Russell Smith presented their account to the Probate Court, by which it was received, examined, allowed, and ordered to be recorded; and the executors were discharged from further accounting with the court, unless thereafter cited by parties interested.

The estate was made Dr.,	$39,345 70
And allowed a credit of	13,636 12
By which it appeared the executors had overpaid	$25,709 48

In January, 1842, an alias *fieri facias* was issued against Sessions, together with the securities on the forthcoming bond, and levied upon the land and negroes which were devised to Martha by her father.

*627] *In February, 1842, Martha claimed the property as her own, and *the question was brought before the court below on the validity of said claim.

Upon the trial, the claimant then introduced John Lane, one of the executors, whose competency was objected to by the plaintiff, but was permitted to testify by the court. Said witness testified that Egbert J. Sessions, one of the defendants in the above-named *fieri facias*, had acted as executor from the time he qualified as such, in conjunction with the two other executors; that Egbert J. Sessions had taken charge of the plantation and slaves, as executor, and had since had the actual control and management thereof; that the possession of Sessions was joint with the other executors, and the control of the slaves was given to him by the other executors as a matter of convenience, as he, Sessions, lived on the adjoining plantation. The witness further testified, that the estate

of Russell Smith was unsettled, and that there are now outstanding debts against the estate of Russell Smith, unpaid, amounting to upwards of twenty thousand dollars. Witness further testified, that the accounts of the affairs of the estate had been kept and rendered mostly by Egbert J. Sessions, the witness, Lane, having made but two annual settlements. Witness stated that he had rendered accounts, as guardian of claimant, Martha A. Sessions. Witness further stated, that he considered Egbert J. Sessions in possession of the property, in the capacity of executor of Russell Smith; that the claimant and Egbert J. Sessions had intermarried in 1838; that said Sessions was now in possession of the property since the marriage; that no formal act of delivery of the property to E. J. Sessions, by the executors, had taken place since the marriage of the claimant with said Sessions.

The plaintiff proved that claimant was now about twenty years of age, and was sixteen years of age at the time of her marriage with said Egbert J. Sessions, which was in September, 1838.

The plaintiff proved by John Lane, that he assented to the execution of the two mortgages above named, by Sessions and wife, the present claimant.

The claimant then proved, that the debts enumerated in said mortgage before referred to, was, as she believed, in renewal of debts contracted with the bank by Russell Smith, in his lifetime, the claimant's father.

Said John Lane further proved, that he was a director in one of the banks to which said mortgages are made; that he had assisted Sessions in making the arrangement with the bank, and also assented that he, Sessions, and claimant should mortgage the property to the banks.

This was all the proof in the cause; and, thereupon, the court instructed the jury, "that the property devised and bequeathed by the will of Russell Smith to the claimant, Martha A., did not vest in her, nor was she entitled to [*628 the possession of it until she, the *claimant, arrived at the age of eighteen years; and although she married the defendant in the execution before that time, the title of the property could not be vested in him until the claimant attained eighteen years of age, at which time, under the will, she became entitled to the possession of it; that the property in controversy is a chose in action, and could not vest in her husband until she or he had reduced it to possession, which could not be done, by the terms of the will, before she was eighteen years of age. If, therefore, when the act of the Mississippi legislature, securing to married women their

property, free from the debts of their husbands, (which went into effect in April, 1839,) the claimant had not attained the age of eighteen years, the husband had no legal estate in it, and it could not be subject to this execution; and if they believe from the evidence, that the possession held by Egbert J. Sessions, one of the defendants in the execution, was held as executor up to that time jointly with the other executors, such possession vested in him no legal interest by his marriage with the claimant, either to the land or slaves, or other personal property.

"To which instructions of the court the plaintiff excepted, and rendered this his bill of exceptions at the time, before the jury retired from the bar, which he prayed might be signed, sealed, enrolled, and made a part of the record, which is done accordingly. J. McKINLEY, [SEAL.]"

Under these instructions the jury found a verdict for the claimant, and to review their correctness, the writ of error was brought.

Henderson, for the plaintiff in error.
Crittenden, for the defendant in error.

Henderson, referred to the following assignment of errors which had been filed in the court below:

1. The court erred in instructing the jury—

"That the property devised and bequeathed by the will of Russell Smith to the claimant Martha Ann, did not vest in her until she arrived at the age of eighteen years.

2. The court erred in instructing the jury—

"That the title to the property did not vest in Egbert J. Sessions until the claimant arrived at eighteen years of age."

3. The court erred in instructing the jury—

"That the property in controversy is a chose in action, and could not vest in the husband of the claimant, until she or he had reduced it to possession."

4. The court erred in instructing the jury—

"If, when the act of the Mississippi legislature, securing to married women their property, free from the debts of their husbands, (which went into effect in April, 1839,) the claimant had not attained the age of eighteen years, the husband had no legal estate in it, and it could not be subject to this
*629] execution."

*5. The court erred in instructing the jury—

"If they believed, from the evidence, that the possession held by Egbert J. Sessions, one of the defendants in the

execution, was held as executor up to that time, (when the act of the legislature of Mississippi, above referred to, was passed,) jointly with the other executors, such possession vested in him no legal interest by his marriage with the claimant, either to the land or slaves, or other personal property."

6. The court instructed the jury contrary to the law of the case.

His argument then proceeded as follows:

Notwithstanding that Russell Smith died in June, 1836, and his daughter Martha married the said Egbert in September, 1838, and the married woman's act took effect on the 15th April, 1839, yet, as from the proof it is to be inferred that Martha was not eighteen years old till about June, 1840, it is assumed the legacy could not vest till the latter date, and therefore was property acquired to her after the said statute took effect, and was therefore secured to her by the 3d section of that act, which is as follows:

"That when any woman during coverture shall become entitled to, or possessed of, slaves by conveyance, gift, inheritance, distribution, or otherwise, such slaves, together with their natural increase, shall inure and belong to the wife, in like manner as is above provided as to slaves which she may possess at the time of marriage."

As to all such slaves, she is entitled, as per sect. 2, to hold them as her property; the control and usufruct, however, to belong to the husband, agreeable to laws heretofore in force.

The Superior Court of Mississippi has decided that this statutory estate of a married woman is not the sole and separate estate known to the common and chancery law: that the latter may still be created, though the statute has not created such estate, but has only secured personal property to a married woman, in the same way lands, in her own right, were secured to her at common law. 2 Sm. & M. (Miss.), 165, 570.

We maintain—

1st. That by the will of Russell Smith the legacy to his daughter Martha vested on the instant of his death, and possession only was deferred; and her marriage with Egbert J. Sessions invested him with a right of property in said legacy, subject only to like postponement of possession. 4 Hen. & M. (Va.), 411; 4 Call (Va.), 321; 1 How. (Miss.), 563, 564; 3 Id., 312, 395, 396; 1 Wash. (Va.), 30.

That to fix a husband's right of property to a legacy accruing to his wife, either before or during coverture, it is not necessary he should reduce it to possession. 3 How. (Miss.), 395, 396; 4 Id., 214.

Especially is this true of a legacy, the possession of which is *postponed by the will, by which the husband's right to reduce to possession is delayed. 4 Hen. & M. (Va.), 411.

2d. The court below erred in charging the jury, that "the property in controversy is a chose in action, and could not vest in her husband until he or she had reduced it to possession, which could not be done by the terms of the will until she was eighteen years," and therefore that the title could not vest in husband, &c., till after wife was eighteen.

Whatever question may be made of what constitutes a chose in action, whether it may be property out of possession, or only a right to recover money due by contract, or by tort, it is manifest, from the state of facts in this case, these slaves were not, (in relation to Egbert J. Sessions,) in any sense, a chose in action. He had the actual and controlling possession of the slaves from the time of marriage. And the right to them, which vested in him by virtue of the marriage, concurring with his actual possession, precludes the possibility that these slaves were, to him, choses in action. Himself was the executor—whom could he sue? both title and possession were his own—for what could he sue? True, he had a right to account with the probate court for his administration, but he neither could sue, nor be sued, for these slaves. See 1 How. (Miss.), 563, 564.

3d. The court erred, also, in instructing the jury that if Egbert J. Sessions had possession of the slaves levied, before his wife was eighteen years old, such possession could only be as executor, and could not invest him with the necessary possession to fix his marital right in the property.

If possession of a wife's legacy be postponed by the will, the husband, it is true, cannot be entitled to recover its possession; but for that same cause his marital right to the legacy shall not be prejudiced. 4 Hen. & M. (Va.), 411; 3 How. (Miss.), 313; 1 Wash. (Va.), 30.

Now, by the laws of Mississippi, where a will does not otherwise appoint, executors and administrators are bound to pay over legacies, or make distribution, twelve months after letters granted. Rev. Co., How. & Hutch., p. 406, §§ 70, 71.

The executors had this estate in administration from testator's death, in June, 1836, till Martha Ann married E. J. Sessions, (one of the executors,) in September, 1838, two years and three months in all.

But for the provision of the will, that the slaves should be kept together till the legatee, Martha, should arrive at eighteen years of age, the law would have terminated the executor's right of possession more than a year before the marriage.

It was not, therefore, in right of their legal office of executors that the possession was then held, but by the appointment of the will only. The husband, therefore, had all the possession of this *vested legacy at the time of his marriage of which the legacy was capable; and the law required nothing more of him to perfect his title *jure mariti*. 3 How. (Miss.), 313. [*631

Two months after Egbert J. Sessions' marriage this judgment was obtained against him, which, by the statute of Mississippi, binds property, personal as well as real, from its date. Rev. Co., How. & Hutch., p. 621; 6 How. (Miss.), 562, 567.

But if we are mistaken in all the preceding, still the charge of the court and the verdict of the jury would be wrong; because, if the title to the property was in the wife, the usufruct for life is, by the statute of 1839, reserved to the husband, and that his life-estate would be subject to execution for his debts. 6 How. (Miss.), 562; 2 Munf. (Va.), 501; 4 How. (Miss.), 230; 2 Id., 39.

Crittenden, for the defendant in error, insisted—

1. That the property devised was not fully vested in her till she arrived at the age of eighteen years.

2. That whatever right or interest might have been previously vested in her by the will, she had not, nor was she entitled to, seisin or possession of the land or slaves before she attained that age.

And therefore, as she did not attain it until after her marriage, and after the passage of said act, the provisions of that act apply to and protect the land and slaves devised to her from the debts of her husband and from the execution in question; and, consequently, that said verdict and judgment are correct, and ought to be affirmed.

Mr. *Crittenden* said that this case strikingly illustrated the wisdom of the law of Mississippi, which was emphatically called "a woman's law." The executor married the daughter at the age of sixteen, and the honeymoon was scarcely over when an execution came to sweep away all that had been provided for her future comfort. The only inquiry is, whether the legacy was vested or not. Suppose she had died, would the husband have had it? Not so, because it was to be applied to charitable purposes. If payment was only postponed, the law would consider it as a vested legacy, but the consequences of a vested legacy do not follow here; therefore it cannot be so. The devise over shows that it was not the intention of the testator that the legacy should vest immediately, and his intention must be the guide to the construction of his will. It

is true that chancery inclines to consider legacies as vested, when it is doubtful, but all agree that every thing must give way to the intention of the testator, to ascertain which is the object of all rules. In this case, the intention is clear. There is a present gift, but the legatee is not to come into possession till the age of eighteen, and in the mean time the executor is to have it, who is directed how to apply it. Again, if the *632] legacy vested and she had died before reaching the age of eighteen, it would have gone to her personal *representatives, but the will gives it another direction. 1 Rop. Leg., 378, *et seq.*; 3 Ves., 236, 536; 1 Meriv., 422, 428; 8 Ves., 547; 2 Meriv., 363, 384.

The rule is, that where interest on a legacy is given to a legatee, courts are inclined to consider it as a vested legacy, although the payment may be postponed to a future time; but here the profits were to go to the executor, and, in case of the death of the legatee, the property was to go in another direction than to her natural heirs. Was it within the protection of the law of Mississippi? The law may be inartificially drawn, but its object is apparent. When it allows a woman to acquire and hold separate property, it is equivalent to saying that it shall not be responsible for the debts of the husband. But it is said by the other side that the husband had at least an estate for life in the slaves, and that this estate was properly liable to execution for his debts. But the act says that he is to have the direction and control of them during coverture, and how can this be complied with if they are removed out of it by being sold? If this were so, the intentions of the legislature could always be defeated. There are no restrictions as to time or place, and they might be sold for twenty or thirty years if the husband continued to live so long and be removed to some distant place from which the woman, when a widow, would find it impossible to reclaim them. Was this what the legislature meant? All that they intended to provide for was that the husband should have a control over them for safe keeping. They intended to carry out their idea plainly, without reference to technical rules or contingent legacies. It has been said that the husband became vested with the property before the passage of the act; but the counsel confounds his possession as executor with that as husband. A case has been cited from Virginia, saying that where a remainder in slaves belongs to a wife, the husband has a vested right. But this is peculiar to that state and arises from her local laws. In Kentucky, slaves are real property for some purposes, and personal for others. The common law has not been the woman's friend. Society has placed her in a higher position

than the law. Under a flattering pretence of unity between husband and wife, the woman has been considered as annihilated, stripped of her property, and in widowhood, allowed only a scanty pittance of the very property which she may have brought. This law of Mississippi is a wise and just law, and we hope it will receive such a construction as will carry out the benign intentions of the legislature. Sessions was not married when the debts were contracted, and no injustice is done to his creditors by refusing to apply his wife's property to the payment of these debts.

Henderson, in reply and conclusion, referred to Rop. Leg., 408, to show that a devise over upon a contingency does not prevent a legacy from vesting. The husband here claims [*633 to *hold as executor after his functions as executor have ceased. The distinction between the choses in action and property of a wife, is clearly pointed out in 3 How. (Miss.), 395. The courts in Mississippi say that the right of the husband is perfect without reducing them into possession. How can property in possession be a chose in action? Sessions had these slaves in possession, and has them now. He undoubtedly had a life-estate in them. The case is badly brought up, because the verdict of the jury includes both land and slaves. In Mississippi property taken in execution may be replevied, but this will not apply to land. The statute only meant to put a wife's personal property in the same condition where the common law places her real estate. But the life-estate of a husband in lands may be sold. The statute gives to the husband the use and control of the wife's slaves as long as he lives, and consequently she can have no benefit from them under any construction of it.

Mr. Justice CATRON delivered the opinion of the court.

The question arising on the charge of the Circuit Court is, What interest had the husband, Sessions, in the property in controversy at the time it was levied on for his debts. If he had any subject to execution, it was acquired by the marriage with his wife as owner. Her right depended on the will of her father.

Russell Smith died in 1836, in the state of Mississippi, leaving a last will and testament, duly proved in Warren county, (27th July, 1836,) leaving E. J. Sessions, P. W. Defrance, John Lane, and George Selser his executors; and also leaving John Lane testamentary guardian to the testator's only child, Martha Ann Smith. Sessions, Lane, and Selser qualified, as executors.

The testator first provided, that his debts should be paid by the proceeds of crops from his plantation, and that the force should be kept together, until the crops paid the same, not exceeding two, however.

He next gave to his step-son, William D. Griffin, a section of land and various slaves, to be delivered to this devisee, when he arrived at the age of twenty-one years: But should he die before, then, and in that event, the property real and personal was to be divided between E. J. Sessions, P. W. Defrance, W. Le Defrance and Charles A. Defrance, provided they should be living—if not, the property to revert to the estate to be disposed of as thereinafter provided.

2. All the remaining balance of the estate real and personal is devised to the daughter, Martha Ann Smith—and should all of the devisees mentioned in the first clause be dead before William D. Griffin attained twenty-one years of age, then the whole estate was to be inherited by said Martha Ann. "But at all events (says the will) the property is to be kept to-
*634] gether and the force worked on *the plantation until my said daughter Martha Ann arrives at the age of eighteen years; at which time my executors are to deliver over to her all of the property first set apart for her, and still retain the possession of the legacy to W. D. Griffin, and not deliver it to her if he lives until he is twenty-one years of age." The proceeds of the crops to be vested in young slaves, in the mean time.

If the daughter should die before she arrive at the age of eighteen, or had an heir of her body, then the legacy left her, (and that left to Griffin also, if vested in her,) are directed to be disposed of otherwise—in charities, &c.

At about sixteen years of age Martha Ann married Egbert J. Sessions, one of the executors, who had the principal management of the estate, and possession of the property. For the additional facts we refer to the statement of the reporter. On this proof the court instructed the jury, "that the property devised and bequeathed by the will of Russell Smith to the claimant, Martha A., did not vest in her, nor was she entitled to the possession of it until she, the claimant, arrived at the age of eighteen years; and although she married the defendant in the execution before that time, the title of the property could not be vested in him, until the claimant attained eighteen years of age, at which time, under the will, she became entitled to the possession of it; that the property in controversy is a chose in action, and could not vest in her husband until she or he had reduced it to possession, which could not be done, by the terms of the will, before she was

eighteen years of age. If, therefore, when the act of the Mississippi legislature, securing to married women their property, free from the debts of their husbands, (which went into effect in April, 1839,) the claimant had not attained the age of eighteen years, the husband had no legal estate in it, and it could not be subject to this execution; and if they believe from the evidence, that the possession held by Egbert J. Sessions, one of the defendants in the execution, was held as executor up to that time jointly with the other executors, such possession vested in him no legal interest by his marriage with the claimant, either to the land or slaves, or other personal property."

As the legacy was outstanding at the time of the marriage, the title was in the executors, subject, first, to the payment of debts; and then the claim of the devisee: but on the contingency, that until the daughter arrive at eighteen, or had an heir of her body, she should in the mean time take nothing more than a support; and this whether she married or not, for a marriage was contemplated as possible before the age of eighteen, as the becoming a mother before was provided for, so that the child might take through the mother.

We think it is free from doubt that the executors had no power to deliver possession of the property devised to the daughter before either of the contingencies above occurred; and that an attempt to do so, either to the guardian, or to the husband, would have been *void, because in violation of the manifest intention of the testator: It follows, that until the wife arrived at the age of eighteen, or had an heir of her body, the husband could only hold possession as executor. Had he died before, then we think it clear, the wife would have taken, and not the personal representative of the husband, as the executors could not assent in his behalf to the vestiture of the legacy in possession. Provisions in wills, that the executors shall retain the property devised until the devisee is of lawful age, and postponements to later periods, are of common occurrence; the executors having assumed the trust, are held to its execution—on their responsibility and prudence the testator relied, and not on future husbands that young and orphan daughters might marry; nor on guardians selected by indiscreet and incompetent minors. These evils are too prominent, and have too long employed the anxious cares of prudent testators, for this court to lend its sanction in any degree to impair the guards interposed by wills, whereby the rights of possession and enjoyment are withheld from devisees. As the testator could have cut them off altogether if he would, there is no ground for complaint [*635

recognized in courts of justice: And yet less ground for complaint is there in a case like the present, where an individual creditor of the husband seeks to defeat the plain provisions of the will, by an assumption that the marital rights superseded the executorial duties, and conferred a power to deliver possession, which the will expressly prohibited.

Mrs. Sessions attained the age of eighteen in 1840. In April, 1839, the act of Mississippi took effect, by which it is provided—that when any woman possessed of property in slaves shall marry, her property in such slaves, and their natural increase, shall continue to her, notwithstanding her coverture; and she shall have, hold, and possess the same as her separate property, exempt from any liability for the debts or contracts of the husband: And when any woman during coverture shall become entitled to, or possessed of, slaves by conveyance, gift, inheritance, distribution, or otherwise, such slaves shall inure and belong to the wife in like manner, as is above provided as to slaves which she may possess at the time of marriage.

As the right of distribution in this case was postponed until after the act of 1839 took effect, the wife could only take the slaves exempt from the husband's debts; we say, could, because it does not appear that the executors of Russell Smith have assented to the legacy and delivered possession to the legatee, Martha Ann.

Without saying more, we are of opinion the charge of the Circuit Court to the jury was proper, and that the judgment must be affirmed.

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*636] *W. AND D. H. DAVIESS ET AL., PLAINTIFFS IN ERROR, *v.* JOHN H. FAIRBAIRN ET AL., HEIRS OF MARY E. FAIRBAIRN, DECEASED, DEFENDANTS IN ERROR.

In affirmative statutes, such parts of the prior as may be incorporated into the subsequent statute, as consistent with it, must be considered in force.[1]

[1] APPLIED. *Sixty-five Terra Cotta Vases*, 10 Fed. Rep., 883.

An affirmative statute is one that uses affirmative words, and not negative words, and as to repeals is construed strictly. *Commonwealth* v. *Crowley*, 1 Ashm. (Pa.), 179; *Regina* v. *Salisbury*, 2 Q. B., 72; *Britton* v. *Commonwealth*, 1 Cush. (Mass.), 302; *United States* v. *Irwin*, 5 McLean, 178; *Adams* v. *Ashby*, 2 Bibb (Ky.), 96; *Sullivan* v. *People*, 15 Ill., 233; *Greeley* v. *Jacksonville*, 17 Fla., 174; *Hurst* v. *Hawn*, 5 Oreg., 275; *Swinney* v. *Fort Wayne, &c. R. R. Co.*, 59 Ind., 205; *West* v. *Pine*, 4 Wash. C. C., 691; *O'Flaherty* v. *McDowell*, 6 H. L. Cas., 142; *Davis* v. *State*, 2 Tex. App., 425.

If a subsequent statute be not repugnant in all its provisions to a prior one, yet if the later statute clearly intended to prescribe the only rules which should govern, it repeals the prior one.[2]

Under the application of these rules, the law of Virginia, passed in 1776, authorising the mayor of a city to take the acknowledgment of a feme covert to a deed, is not repealed by the act of 1785, or that of 1796.

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Kentucky.

It was an ejectment brought by the heirs of Mary E. Fairbairn, to recover a half-acre lot in the city of Louisville, designated on the old plan as number 22, and on the new plan as number 31.

There were many questions in the case, but as the opinion of the court turned upon a single point, it is not necessary to state any except that one.

On the 12th of March, 1811, Mary E. Fairbairn, being the wife of Thomas H. Fairbairn, and the owner of the lot in controversy, subject to the dower interest of her mother, united with her husband and mother in executing a deed for the premises. She then resided in the city of Baltimore. It was alleged by her children and heirs that this deed was incompetent to pass her interest, being improperly executed.

They therefore brought an ejectment to recover it.

The deed was as follows:

"This indenture, made this 12th day of March, in the year of our Lord 1811, between Elizabeth Henry, Thomas H. Fairbairn and Maria his wife, (daughter and heiress of Daniel Henry, deceased,) of the city of Baltimore, in the state of Maryland, of the one part, and Dr. Richard Ferguson, of the town of Louisville, in the county of Jefferson and state of Kentucky, of the other part, witnesseth: that the said Elizabeth Henry, and Thomas H. Fairbairn and Maria his wife, for and in consideration of the sum of eight hundred dollars, cur-

[2] DISTINGUISHED. *United States* v. *Cook Co.*, 9 Biss., 59. FOLLOWED. *State* v. *Stoll*, 17 Wall., 431. CITED. *United States* v. *Tynen*, 11 Wall., 92; *Kohlsaat* v. *Murphy*, 6 Otto, 158; *Cooke* v. *Ford*, 2 Flipp., 32; *Heckmann* v. *Pinkney*, 81 N. Y., 216; *Stingle* v. *Nevel*, 9 Oreg., 63.

In *United States* v. *Tynen*, *ut supra*, it is said: "And even where two acts are not in express terms repugnant, yet, if the latter act covers the whole subject of the first, and embraces new provisions plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act." And it was held that where there are two acts of Congress on the same subject, and the last one in date embraces all the provisions of the one prior in date, and also new provisions, and imposes different or additional penalties, the later act operates, without any repealing clause, as a repeal of the one prior in date. See *United States* v. *Claflin*, 7 Otto, 546; *Butler* v. *Russel*, 3 Cliff., 251; *Norris* v. *Crocker*, 13 How., 429; *Paterson* v. *Tatum*, 3 Sawy., 164; *United States* v. *Barr*, 4 Id., 254; *United States* v. *Cheesman*, 3 Id., 424; *Henderson's Tobacco*, 11 Wall., 652.

rent money of the United States of America, to the said Thomas H. Fairbairn in hand paid, at and before the execution of these presents, the receipt whereof is hereby acknowledged, the said Elizabeth Henry, as tenant in dower, hath aliened, released, and confirmed, and by these presents doth alien, release, and confirm; and the said Thomas H. Fairbairn as tenant by the curtesy, and the said Maria his wife, as tenant in fee-simple, have granted, bargained, sold, conveyed, released, and confirmed, and by these presents doth grant, bargain, sell, release, convey, and confirm, unto the said Richard Ferguson, his heirs and assigns, forever, a *certain lot *637] of land, with all the appurtenances, situate, lying, and being in the town of Louisville aforesaid, and known on the plan or map thereof by the number ninety-one, (91,) containing half an acre, be the same more or less, on Main street, adjoining the northwardly side of the half-acre lot whereon the said Ferguson now lives, and between the same and Main street: to have and to hold the said half-acre lot number ninety-one, with all the appurtenances, unto the said Richard Ferguson, his heirs and assigns, to his and their only proper use and behoof forever. And the said Thomas H. Fairbairn and Maria his wife do covenant and agree, to and with the said Richard Ferguson, and his heirs and assigns, that they, the said Thomas and Maria, will, and their heirs, executors, and administrators, shall, warrant and forever defend the said lot of land numbered ninety-one, with all the appurtenances, unto the said Richard Ferguson, his heirs and assigns, against all and every person or persons whatsoever lawfully claiming or to claim the same.

"In witness whereof, the said Elizabeth Henry, Thomas H. Fairbairn, and Maria his wife, have hereto set their hands and seals, on the day and year first written.

ELIZABETH HENRY, [L. S.]
THOMAS H. FAIRBAIRN, [L. S.]
MARIA ELIZA FAIRBAIRN. [L. S.]

"Signed, sealed, and delivered, in presence of—
EDW'D JOHNSTON,
JNO. HARGROVE,
HENRY PAYSON,
CUTH. BULLITT,
THOMAS LESTER."

"Baltimore county, state of Maryland, sct.:

"Be it known and remembered, that on this 12th day of March, 1811, Elizabeth Henry, and Thomas H. Fairbairn and

Maria his wife, parties to the within and foregoing deed of conveyance to Dr. Richard Ferguson, come in their proper person before me, Edward Johnston, mayor of the city of Baltimore, in the state aforesaid, and signed, sealed and delivered said deed of conveyance, as and for their voluntary act and deed; and the said Maria, being privately examined by me out of the presence and hearing of her said husband, did, of her own free will and consent, again consent to and acknowledge the said deed of conveyance as and for her act and deed, the same being shown and explained to her; and also relinquished and released all her right, title, interest, and estate, and fee, of, in, and to the lot of land number 91, with all the appurtenances by the said deed conveyed, or intended to be conveyed.

[L. S.] "In testimony whereof, I have hereto set my hand, and caused the corporate seal of the city of Baltimore to be hereunto affixed, the day and year above written.

"EDW'D JOHNSTON,
Mayor of the city of Baltimore."

*Upon the trial in the court below, the following instructions were given with reference to this deed. [*638

"And in substitution of a number of instructions moved by the plaintiff, the court gave to the jury these instructions.

"Instead of the plaintiff's instruction No. 1, the court instructed the jury, that the deed of conveyance by Thomas H. Fairbairn, &c., of 12th March, 1811, to the defendant Dr. Richard Ferguson, whereof a copy was read in evidence by the plaintiff, was not in law the deed of the *feme covert* Maria E. Fairbairn, is not her deed of conveyance for any purpose whatever, and passed from her to Dr. Ferguson no estate whatever in the lot of land in controversy."

The bill of exceptions brought up this instruction, amongst others:

The question was, whether the mayor of the city of Baltimore had a right to take the acknowledgment.

The act of Virginia, passed in 1776, which had been adopted by Kentucky, (4 Littell's Laws of Kentucky, 432,) allowed the mayor of a city to take an acknowledgment, where the grantor resided out of Virginia.

Two acts were afterwards passed by Virginia, one in 1785 and the other in 1796, prescribing other modes of taking acknowledgments in such cases, and the question was, whether these acts repealed that of 1776. The provisions of these acts are quoted in the opinion of the court, and need not be repeated.

Crittenden, for the plaintiffs in error.
Loughborough, for the defendants in error.

Crittenden, for the plaintiffs in error, referred first to the act of Virginia passed in 1748, (4 Littell, 423; 1 Statute Laws of Kentucky, 429,) and then to the succeeding acts. The act of 1785 was thought to repeal that of 1776, but there was no repealing clause in it, and the courts of Kentucky construe them to be *in pari materia*. The laws of Virginia successively enlarged the means of conveyance. The title of the act of 1796 was "to enable," &c. The rule is, that repugnancy in statutes must be clear and undeniable, before courts will assume it to exist. Dwar. Stat., 638, 699, 717, 718, 726, 734.

And again, where a statute is remedial and enlarging, it will not be held to control the operation of a previous one. The general character of these statutes is enabling. The act of 1776 allows femes covert to go before a mayor; that of 1785 to appear in court and acknowledge a deed. Where is the inconsistency between the two? If the latter is a repeal of the former, we have never found it out in Kentucky. There are more conveyances of land there than in any other state, and much land is owned by non-residents. Up to 1827, the doctrine now contended for was never heard of. The first time that the question was raised was in the case of *Hynes* and *Campbell*, 6 Mon. (Ky.), 286, much relied on by the other side. But *there was no question in that case about a feme covert. A deed was set aside because justices did not certify that it was subscribed before them. The court say that the act of 1785 repeals that of 1776 as to justices. But then the provisions of the two laws are inconsistent with each other in this respect. In *Miller* v. *Henshaw*, 4 Dana, (Ky.), 327, the point is not decided. There are some loose dicta, but although the decisions of state courts upon state laws are binding upon this court, dicta of judges are not. In *Taylor* v. *Shields*, 5 Litt. (Ky.), 295, the court held that a subsequent statute requiring deeds to be recorded in eight months, did not repeal a prior one allowing eighteen months. 6 Mon. (Ky.), 186, refers to the preceding case. The act of 1796 contains a general repealing clause, (1 Litt., Ky., 508, 509,) repealing all that is inconsistent with the acts therein recited and continued. But affirmative subsequent statutes are not held to be inconsistent with prior ones. 6 Co., part 11, p. 54.

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The Digest sanctioned by the judges of the Court of Appeals contains this act of 1776.

Loughborough, for defendants in error.

The first opinion of the court pronounced on the trial was, that the deed of March 12, 1811, was ineffectual as to the wife of T. H. Fairbairn, and that her title to the lot did not pass thereby.

The act of Virginia of 1748 respecting conveyances provided for cases of conveyances by persons residing in the state. It will be found in 4 Littell, 423, (1 Statute Laws of Kentucky, 429.)

By the act of 1785, (1 Statute Laws, 432,) husband and wife residing in another state were enabled to convey the dower or inheritance of the wife within the commonwealth by the acknowledgment of the deed, and the privy examination of the wife before two justices of peace of the county of the wife's residence, to be empowered by a commission for that purpose from the court in which the deed should be recorded.

By an act of 1792, (1 Littell, 152, 1 Statute Laws, 434,) the acknowledgment and subscription of the deed before two justices of the peace, though not empowered by commission, and their certificate of the privy examination of the wife, upon being recorded in due time, shall be effectual to pass the wife's right of dower.

In 1795, shortly after Kentucky became a state, its legislature considering the complexity and uncertainty of the statute laws in force, provided by act of December 17, (1 Littell, 293,) for a revision thereof, for a selection of such as ought to be continued in force, and for a reduction of all of those relating to the same subject into one act.

Revisors were accordingly appointed, and discharged their duty. The results of their labors may be seen in various important acts passed in 1796, in the first volume of Littell's Laws. Having enacted them, the legislature, by an act of the 19th December, 1796, *provided that they [*640 should take effect on the 1st day of January, 1797, and that so much of any act or acts as came within the purview of the said acts should be repealed from and after that day. 1 Littell's Laws, 508, 509.

One of these revised statutes was the act to reduce into one the several acts for regulating conveyances, (1 Littell, 567, (1 Statute Law, 437.) It provides specially (section 4) for the conveyance by husband and wife, living in another state, of the wife's land in Kentucky. The mode prescribed is the acknowledgment of the deed, and the privy examination of the wife before two justices of the peace of the county of her residence, to be commissioned for that purpose. This act also

embraces the provisions of the act of 1792, respecting the transfer of the wife's dower, in its 6th, 7th, and 8th sections.

It was the law in force at the date of the deed to Ferguson.

In *Elliott* v. *Piersoll*, 1 Pet., 338, this court held that in Kentucky the capacity of a feme covert to convey her land, is the creature of the statute law, and that to make her deed effectual, the forms and solemnities provided by that law must be observed. This is the received doctrine in the courts of Kentucky. It is held, there, that the deed of a feme covert to convey her inheritance, or even her dower, must not only be executed in the mode, and with the solemnities required by the statute laws, *Phillips et ux* v. *Green*, 3 Marsh. (Ky.), 12; *Steele* v. *Lewis*, 1 Mon. (Ky.), 49; *Roberts' heirs* v. *Elliott's heirs*, 3 Id., 397; *Smith* v. *White*, 1 B. Mon. (Ky.), 19: but it must be actually recorded, together with the certificate of her privy examination, not merely lodged in the proper office for record, *Whitaker* v. *Blair*, 3 J. J. Marsh. (Ky.), 241; *Tomlin* v. *McChord's Reps.*, 5 Id., 336; and that, too, within the time fixed by the statute, otherwise it is void. *Prewitt* v. *Graves*, 5 Id., 124; *Applegate* v. *Gracey*, 9 Dana, (Ky.), 215. And to authorize its recordation it must be authenticated in the mode prescribed, and by the officers appointed for that purpose. *Hunt* v. *Owings*, *&c.*, 4 Mon. (Ky.), 21; *McConnell* v. *Brown*, Litt. (Ky.), Sel. Cas., 464; *Womack* v. *Hughes*, Id., 292. And if, in fact, placed on the record without being so authenticated, it is still regarded as an unrecorded instrument—cases last cited.

These cases show the strictness with which the statutes of Kentucky, authorizing married women to part with their titles, have been construed by its courts; and the care they have exhibited in the protection of the rights of such persons and their heirs.

In this case, though the deed to Ferguson was in fact recorded, it was not upon its authentication, as regarded the feme covert, properly admitted upon the records. As to her it is an unrecorded deed.

The Mayor of Baltimore was not authorized to take her acknowledgment, and to make and certify a privy examination.

*641] It was contended in the Circuit Court that he derived authority *to perform these acts from a statute of Virginia of 1776, (4 Littell, 432.)

The answer to this is, 1st. That this act was impliedly repealed by the act of 1785.

This act of 1785 occupied the same ground, and so far as regards conveyances of real estate, contemplates and provides

for the same case. It was decided by the Court of Appeals of Kentucky, in the case of *Hynes* v. *Campbell*, 6 Mon. (Ky.), 289, that this act virtually, yet effectually, repealed that of 1776.

2d. When the legislature passed the act of 1796, it was obviously intended that all the provisions of existing statutes on the subject of conveyances should be thereby superseded. Its history and title make this manifest. It was a codification of all the laws which it was intended should remain in force. Its first sections are the same as those of the act of 1785. Those succeeding are the provisions of the act of 1792. The old act of 1776 was wholly dropped, other modes than those of that act being adopted for the conveyance of land by non-residents.

Without a clause of repeal, it would seem that after the act of 1796, that of 1776 was not in force. To hold otherwise would imply the folly on the part of the legislature in the effort to render simple and condense into one law all acts on the subject, to have retained two acts on the same subject by which the same thing could be done in different modes—or would be to deny to the legislature the power to simplify and reduce into one the laws of conveyances, since there can be no doubt that was its intention.

But having adopted the codes, so to call them, of the revisors, the legislature, by a separate act, passed on the same day, (1 Littell, 508,) as if to leave no doubt upon this subject, expressly repealed all former acts coming within the purview of these statutes.

Can it be said that the act of 1776, so far as it regarded conveyances of real estates, by non-resident husbands and wives, is not within the purview of the act of 1796?

As to what subsequent statutes annul prior ones, see 1 Pick. (Mass.), 45; 12 Mass., 563; 5 Pick. (Mass.), 169. The case of *Taylor* v. *Shields* ought to have no weight upon this point. There must have been an error in copying the word "eight" instead of "eighteen." The last syllable must have been left out by mistake, for no good reason can be given for allowing the people of the state eighteen months to record their deeds, and restricting non-residents to eight.

It is admitted by the other side that the act of 1796 repeals the prior statute as to justices of the peace, because it makes provision for them; but it is argued that the authority of a mayor was permitted to remain, because no notice is taken of him in the act. But both laws are equally applicable to justices. What good reason, then, can be given for the distinction?

This case does not rest on an implied repeal only; we say that *there was an express repeal. The revisors were to collect what was proper to be retained, and omit what ought to be left out. The title of the act of 1796 was "to reduce into one," &c. One branch of the laws reported on by the revisors related to county courts, and upon this subject they made an entirely new code. We say that the same purpose was intended with regard to the deeds of femes covert. Additional guards were thrown around them for protection. They were required to go into a court or before commissioners. If the legislature had repealed the whole act of 1776, by name, they would have gone further than they wished, because they intended all such parts of it as related to personal property to remain in force. We must find out the intention of the legislature by looking at the evils which existed before the passage of the law, the circumstances of the case, &c. 6 Dane Abr., 595; 9 Pet., 317; 3 Wheat., 610.

It is said, in 6 Dane Abr., 595, that where the legislature intends a revision, it amounts to a repeal of prior laws.

In the act of 1796, clerks are directed to record papers "acknowledged as before prescribed," which shows that the legislature intended to make a new rule.

Crittenden, in reply and conclusion.

The deed is admitted by the other side to be good, if the statute of 1776 is not repealed. The burden of proof is on him, therefore, to show that it has been so; and it has been attempted to be shown,

1. From its being inconsistent with the act of 1785.
2. From its inconsistency with 1796.
3. From an express repeal by 1796.

The fact that the act of 1796 is the work of revisors, cannot affect the construction of it. There is no rule like this laid down by the elementary writers. It is only, after all, a revised statute. Every act of a legislature implies a revision of all former laws; and is the construction of it to be varied, because A. B. prepared it? A part of the duty of revisors is to say what statutes shall be repealed. If they thought that the act of 1776 ought to have been repealed, why did they not say so? A revised act is cumulative, 11 Leigh (Va.), first case in the volume. What part of the act of 1785 repeals that of 1776? By 1748 deeds must be acknowledged before the General Court, or a County Court, in Virginia. By 1776 a feme covert may go before a mayor, and by 1785 she may go before any court of record, or two justices appointed by a commission. But these might all be put into one statute, and not be

inconsistent with each other. How can the circumstance that they are in different statutes vary the result? Statutes *in pari materia* must be construed together.

In 5 Pick. (Mass.), a higher penalty was imposed than had been imposed by a preceding law. Here there was a direct conflict. But *in the case in Foster, where £20 [*643 per month, and 12*d* per Sunday, were inflicted for not going to church, both penalties could be levied. The multiplication of the means of acknowledging deeds was only a facility afforded to women.

If the act of 1785 did not repeal that of 1776, the act of 1796 did not, because it is almost an exact transcript of former laws. The designation of one person to do any given thing, does not exclude the right of another to do the same thing. It is said that the legislature intended to protect women, but Mrs. Fairbairn never denied or questioned the validity of her deed, as long as she lived.

Mr. Justice McLEAN delivered the opinion of the court.

This case is brought here by a writ of error to the Circuit Court for the district of Kentucky.

The lessors of the plaintiff brought an action of ejectment, to recover a half-acre lot in the city of Louisville, numbered on the new plan of the city ninety-one. Richard Ferguson, Daviess, and others, were made defendants. The jury found the defendants guilty, and a judgment was entered against them. On the trial, exceptions were taken to various rulings of the court, only one of which it is material to consider.

The court instructed the jury, "that the deed of conveyance, by Thomas H. Fairbairn and wife, of the 12th of March, 1811, to the defendant, Dr. Richard Ferguson, whereof a copy was read in evidence by the plaintiffs, was not, in law, the deed of a feme covert, Maria E. Fairbairn; is not her deed of conveyance for any purpose whatever; and passed from her to Dr. Ferguson no estate whatever in the lot of land in controversy."

The plaintiffs below claimed as heirs at law of Maria E. Fairbairn. The fairness of the purchase of the lot by Ferguson was not controverted, nor that he paid for it an adequate consideration. The lot having descended to Maria E. Fairbairn, and her husband being dead, her heirs claim the property, on the ground that the acknowledgment of the deed by their mother, she being a feme covert, was defective. And so the court ruled in the above instruction.

The deed was acknowledged on the 12th of March, 1811, the day it bears date, by Elizabeth Henry, who signed it, and

who had a dower interest in the lot, and by Fairbairn and wife; the latter being examined separate and apart from her husband, in due form, before the mayor of Baltimore, who affixed his certificate and the seal of the corporation to the acknowledgment.

On the 20th of May, 1811, Warden Pope, clerk of the County Court of Jefferson, in which Louisville is situated, certified that the deed was received in his office; and it being duly certified and authenticated, he recorded the same.

By the Virginia act of 1776, adopted by Kentucky, 4 Litt. *644] Laws of Kentucky, 432, entitled "An act to enable persons living in other *countries to dispose of their estates in this commonwealth, with more ease and convenience," it was provided "that a person residing in any other county, for passing any lands and tenements in this commonwealth, by deed, shall acknowledge or prove the same before" the mayor or other chief magistrate of the city, town or corporation, wherein or near to which he resides. But where there was no mayor or other chief magistrate within the county, then a certificate, under the hands and seals of two justices or magistrates of the county, that such proof or acknowledgment has been made before them, is sufficient. Without an acknowledgment, the fee did not pass under this statute. And "where any person making such conveyance shall be a feme covert, her interest in any lands or tenements shall not pass thereby, unless she shall personally acknowledge the same before such mayor or other chief magistrate, or before two justices or magistrates, as aforesaid." A privy examination is required, and the same being certified, the deed may be recorded in the county where the land lies. And such deed shall be effectual to pass all the interest of the feme covert.

The acknowledgment of the deed under consideration, in all respects, conforms to the requirements of the above act; and the important question is, whether, at the time of the acknowledgment, the act was in force? If the act had not been repealed, the deed is unquestionably valid.

The plaintiffs in error contend that the above statute was repealed by the act of 1785, and also of 1796. The act of 1785 is entitled "An act for regulating conveyances," in the 1st section of which it is provided, "that no estate of inheritance, or freehold, or for a term of more than five years, in lands or tenements, shall be conveyed from one to another, unless the conveyance be declared by writing, sealed and delivered; nor shall such conveyance be good against a purchaser for valuable consideration, not having notice thereof,

unless acknowledged or proved before the General Court, or before the court of the county, city, or corporation, in which the land is conveyed, or in the manner hereinafter directed," &c.

"When husband and wife shall have sealed and delivered a writing, purporting to be a conveyance of any estate or interest, if she appear in court, and being examined privily and apart from her husband, by one of the judges thereof, &c.; or if before two justices of the peace, of that county in which she dwells, who may be empowered by commission, to be issued by the clerk of the court wherein the writing ought to be recorded," &c., shall be sufficient to convey her estate.

In this act there is no express repeal of the act of 1776, consequently that act can only be repealed in so far as it may be repugnant to the subsequent act. They are both affirmative statutes, and such parts of the prior statute as may be incorporated into the subsequent one, as consistent with it, must be considered in force. This *is a settled [*645 rule of construction, and applies with peculiar force, to these statutes. Their object was to prescribe certain modes by which real property within the commonwealth should be conveyed, by residents and non-residents, and also by femes covert, and it must be admitted, that no other modes of conveyance than those which are so prescribed will be valid. These forms have been adopted for the security of real property, and the convenience of individuals; hence we find in the statute books of all the states, numerous acts regulating the signing, acknowledging, and recording of deeds.

If the act of 1785 be not repugnant in all its provisions to the act of 1776, yet if the former clearly intended to prescribe the only modes by which real estate should be conveyed, it repeals the prior act. And this intention, it is said, is found in the act of 1785. To some extent, this may be correct. In the first section of that act, it is provided, that, "no estate of inheritance in lands or tenements shall be conveyed from one to another, unless the conveyance be declared by writing, sealed and delivered." Now a deed, to be valid as a conveyance, under this statute, must be in writing, sealed and delivered. This is the common law definition of a deed. But there are other requisites to make this conveyance valid against a purchaser for a valuable consideration, without notice. The deed must be acknowledged as the statute requires, and lodged with the clerk for record. The conveyance as between the parties would be valid, under this statute, without acknowledgment, but unless acknowledged and recorded, or lodged

for record, would not be notice to subsequent and innocent purchasers.

The acts under consideration provide specially the mode by which the estate of a feme covert shall be conveyed. In the act of 1785, her privy examination may be made in court, or by one of the judges thereof, or she may be examined by two justices of the peace of the county where she resides, "who may be empowered to do so by commission," &c.

By the act of 1776, the acknowledgment and privy examination of a feme covert were required to be made before the mayor or other chief magistrate, or before two justices or magistrates of the town or place wherein she shall reside. The acknowledgment before two justices is retained in the act of 1785, with this additional requisite, that the justices shall be commissioned, as provided, to perform this duty. This necessarily repeals that part of the prior act which authorized the acknowledgment to be taken before two justices, without being commissioned. The latter act is, in this regard, repugnant to the former. The provisions cannot stand together, as the latter act superadds an essential qualification of the justices not required by the former. But the important question is, whether, as the act of 1875 made no provision authorizing a mayor of a city to take the acknowledgment of a feme covert, that provision in the act of 1776 is repealed by it. In *646] this respect it is clear there is no *repugnancy between the two acts. The two provisions may well stand together, the latter as cumulative to the former.

Does a fair interpretation of the act of 1785 authorize the inference, that the legislature intended no conveyance by a feme covert should be valid, unless acknowledged in the form prescribed by that act? We think no such inference can be drawn. In the first section of that act, in reference to ordinary acknowledgements of conveyances, in order, when recorded, that they might operate as notice to subsequent purchasers, it is required that the acknowledgment should be made as provided, "or in the manner herinafter directed." The words here cited can have no bearing on the execution of a conveyance by a feme covert. In a subsequent part of the same section, provision is made for the execution of such an instrument, which is complete, without reference to any other part of the statute. The above words, therefore, could only refer to the conveyances spoken of in the first part of the section, and in order that they might operate, when recorded, as notice.

Upon a careful comparison of these statutes, as regards the point in controversy, we think there is no repeal of the act of

1776, by the act of 1785. There is no express repeal; no repugnancy, as regards the power of the mayor of a city to take the acknowledgment of a feme covert; nor on this point are there any words of the latter act which show an intention to make its provisions exclusive. We are therefore brought to the conclusion, looking only at these statutes, that the latter act, in this regard, may be considered as cumulative.

As having a strong and decided bearing on this view, we refer to *Wood* v. *The United States*, 16 Pet., 362. In that case, the court say, "the question then arises whether the 66th section of the act of 1799, chap. 128, has been repealed, or whether it remains in full force. That it has not been expressly, or by direct terms, repealed, is admitted; and the question resolves itself into the more narrow inquiry, whether it has been repealed by necessary implication. We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some or even all the cases provided for by it, for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new laws and those of the old; and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy."

We come now to consider the act of 1796. The act of the 20th of December, 1792, concerning the relinquishment of dower, in the 2d section, provides that dower may be relinquished before two justices of the peace, where the parties reside out of the commonwealth, and the clerk of the county is required to certify that the persons taking the acknowledgment were justices, &c. This provision is repugnant to that of the act of 1785, which requires a commission to be issued to such justices.

*By the act of the 17th of December, 1795, two persons were authorized to be appointed by joint ballot of [*647 the legislature, to revise the laws in force, &c. These persons, having been so appointed, reported the act of 1796, which is entitled "An act to reduce into one the several acts, or parts of acts, for regulating conveyances." In this act are included parts of the act of 1776, and nearly the whole of the act of 1785. It was passed the 19th of December, 1796, and, with all other acts reported at the same time, was adopted by a general act, referring to the various acts, and providing that "so much of every act or acts before recited, as comes within the purview of this act, shall be and the same is hereby repealed from and after the 1st day of January, 1797," on which day the above act took effect.

That part of the act of 1776, authorizing the mayor of a

city to take the acknowledgment of a feme covert, is not included in the act of 1796; nor were certain provisions of the act of 1748, "for settling the titles and bounds of lands," &c., included, some parts of which have since been recognized by the Court of Appeals of Kentucky, as in force.

Great reliance is placed by the counsel for the defendants in error, in the case of *Hynes's Representatives* v. *Campbell*, 6 Mon. (Ky.), 286. In that case, the complainants prayed a rescision of the contract for the conveyance of a certain tract of land, on the ground of a defect of title; and the court held, that they were not bound to accept the deed for the land, tendered by the defendant, as some of the conveyances under which he claimed were not acknowledged and recorded, as the law required. The deeds thus objected to "were acknowledged before two justices of the peace of Dunwiddie county, Virginia, who certified simply that the grantor acknowledged the same before them, as the law required," without adding that the grantor "also subscribed the same in their presence." This proceeding was under the act of 1792, which had been construed to require a certificate of the justices that the deed had been subscribed in their presence, in regard to deeds executed within the state. And the court say, they turned their attention to the act of 1776, "and they find that it regulates only conveyances made out of the state, and that it provides for acknowledgement alone, before two justices of the peace, and says not a word about subscribing, and if that act is in force in this respect, it will exactly embrace the case in question." And they held that the above act was virtually repealed by the act of 1785, which requires that the two justices taking the acknowledgment should be commissioned to do so. This view of the court, as regards the acknowledgments of the deeds then before them, was undoubtedly correct. It is the construction which we have before given to this part of the act of 1785. The attention of the court was not drawn to any other point than the one before them. They did not say that that part of the act of 1776 which regulates
*648] the acknowledgment *by a feme covert, which is wholly different from the above, was repealed. It is true their language is general, but their meaning must be limited to the point under consideration. This decision, therefore, cannot be considered as having a bearing on the point now before us.

In the case of *Prewet* v. *Graves et al.*, 5 J. J. Marsh. (Ky.), 120, the court say, that the 5th section of the act of 1748 had been repealed by subsequent and repugnant enactments. In *Miller et al.* v. *Henshaw & Co.*, 4 Dana, (Ky.), 323, they say, in reference to the act of 1776, and to the decision of *Hynes's*

Representatives v. *Campbell*, above cited, that the act of 1776 "is nowhere repealed by express words, but only by construction, in consequence of the inconsistency of its provisions with those of subsequent statutes; and as none of the subsequent statutes relate to the authentication of deeds of personalty, out of the state, except those which reduce the number of witnesses from three to two, there can be no inconsistency, and therefore no constructive repeal of so much of this statute as relates to deeds of personalty, except as to the number of witnesses."

In *McGowen* v. *Hay*, 5 Litt. (Ky.), 244, the court held the act of 1748 was in force in Kentucky, in regard to the acknowledgment and recording of mortgages and deeds of trust. By the act of 1796, a deed, executed out of the commonwealth for lands within it, was required to be recorded in eight months. The act of 1785, which preceded it, required such deed to be recorded in eighteen months; and in *Taylor* v. *Shields*, 5 Litt. (Ky.), 297, the question was, whether the latter of these acts, in this respect, had repealed the former; and the court say, "we should hesitate much to give such effect to the latter statute." "Virtual repeals are not favored by courts. A body of acts ought to be held as one act, so far as they do not conflict with each other. Here the same restriction to the 'manner prescribed by law,' existed before the passage of our act, as well as afterwards; and if, in transcribing the Virginia Code into ours, any part shall be adjudged to be repealed, barely by putting in the date of transcribing as the date of the law, and because the provision, so transcribed, shall apparently conflict with any former part not so transcribed, it may be of serious consequence to the community." "We incline," the court say, to the opinion, "that the clause in our statute, (of 1796,) 'in the manner prescribed by law,' meant to retain, and was intended to retain, former provisions, with regard to deeds entire;" and they held, that the recording of the deed within eighteen months, under the act of 1785, was sufficient.

That part of the act of 1785, which regulated the time of recording deeds, executed without the commonwealth, was not copied into the act of 1796, and yet the court held that the latter act, in this respect, did not repeal the former.

In *Elliott et al.* v. *Piersoll et al.*, 1 Pet., 339, this court say, the Virginia statute of 1748 "was adopted in Kentucky, at her *separation from Virginia, and is understood never to have been repealed." [*649

It does not appear that the question, as to the validity of the acknowledgment of a deed before the mayor of a city, by a feme covert, under the act of 1776, since that of 1785 has

been enacted, has ever been decided. Some general expressions, as above stated, have been used by the Court of Appeals, in regard to the repeal of the former act by the latter, but those expressions did not relate to the above question. And it may be again observed, that those remarks by the Court of Appeals can only be held to apply to the matter then before them; and that a more extended application of them would be inconsistent with the views taken by the same court, in the other cases cited. If the provision in the act of 1785, requiring a deed executed out of the state to be recorded in eighteen months, is not repealed by the act of 1796, requiring such deed to be recorded in eight months, is the act of 1776, authorizing the acknowledgment of a deed before a mayor, by a feme covert, repealed by subsequent acts? None of those acts repeal, in terms, the above provision in the act of 1776, and they contain no repugnant provision. Consequently, the first act stands unrepealed. The different acts on the same subject, in the language of the Court of Appeals, must be "considered as one act." In this view, the provision in question stands consistently with all the subsequent statutes; and on this ground we feel authorized to say, that the acknowledgment of the deed before us is valid, under the act of 1776, and that it conveyed to Ferguson, the grantee, a good title in fee-simple. The clause of the act of 1796, "repealing so much of the acts referred to as come within the purview of that act," extends no further than the repugnancy of the act of 1796 to the provisions of the acts named.

Upon the whole, the judgment of the Circuit Court is reversed, at the costs of the defendants, and the cause be remanded, &c.

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*650] *LESSEE OF WILLIAM L. BROWN AND WIFE, PLAINTIFF IN ERROR, *v.* JOSEPH CLEMENTS AND JONATHAN HUNT, DEFENDANTS IN ERROR.

Under the acts of Congress, providing for the subdivision of the public lands, and the instructions of the Secretary of the Treasury, made under the act of 24th April, 1820, entitled "An act, making further provision for the sale of the public lands," it is the duty of the surveyor-general to lay out a fractional section in such a manner that an entire quarter-section may be had if the fraction will admit of it.

The surveyor-general has no right to divide a fractional section by arbitrary lines, so as to prevent a regular quarter-section from being taken up.[1]

[1] OVERRULED. *Gazzam* v. *Phillips*, 20 How., 377. CITED. *Railroad Co.* v. *Schumeir*, 7 Wall., 289.

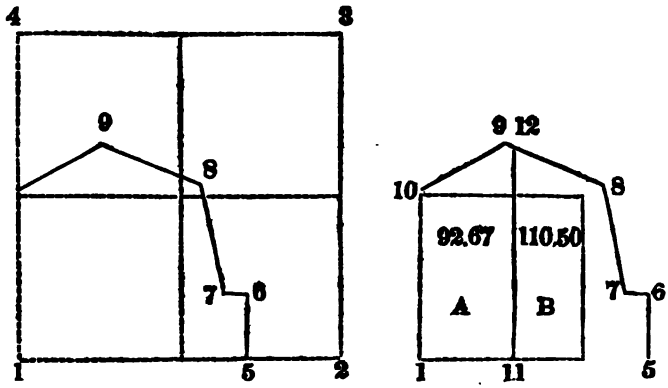
Brown's Lessee v. Clements et al.

THIS case was brought up, by writ of error, under the twenty-fifth section of the Judiciary Act, from the Supreme Court of the state of Alabama.

It was an ejectment, brought by the plaintiffs in error to recover $2\frac{40}{100}$ acres of land, in the possession of Clements as the tenant of Hunt. The plaintiff claimed title through a patent to James Etheridge, and the defendants through a patent to W. D. Stone. Both Etheridge and Stone claimed as pre-emptioners under the act of Congress, passed on the 29th of May, 1830.

The question depended upon the manner in which the fractional section twenty-two, in township four south, of range one west, in the district of lands subject to sale at St. Stephens, Alabama, should be laid out.

A reference to the annexed diagrams will make it more intelligible.



Nos. 1, 2, 3, 4 represent the whole section; but in consequence of prior claims or grants, only that part of it included within 1, 5, 6, 7, 8, 9, 10, was subject to entry, containing the entire south-west quarter-section, and some additional land upon the east and north. The surveyor divided the whole of this into two parts by a line running from 11 to 12, one of which parts (marked A) contained 92.67 acres, and the other (marked B) contained 110.50. The *plaintiff [*651 claimed to extend the part A over the whole square which constituted the quarter-section, as represented by dotted lines.

On the 28th of January, 1831, Etheridge presented the following application and affidavit:

"To the Register and Receiver of the Land-office at St. Stephens:

"You will please to take notice that I, James Etheridge, of

Mobile county, Alabama, claim the right of pre-emption, under the act of Congress of the 29th May, 1830, to the south-west quarter-section 22, t. 4, r. 1 west."

Affidavit.—"James Etheridge, being sworn, maketh oath that the above described tract of land was planted and cultivated by him in the year 1829, and remained in his possession from the year 1829 until after the 29th May, 1830. That the said land was occupied and cultivated by him in his own right, and not as the tenant of any other person. That the said land was enclosed with his own fence, and that there was no person concerned with him in the occupation and cultivation of the said land; and that the present claim does not interfere with the right of any other person, and that he believes he is entitled to the same under the act of Congress of the 29th May, 1830, and that the said tract is within the corporate limits of the city of Mobile.

J. ETHERIDGE."

The affidavit was sustained by the oaths of Daniel Robertson and John Carr.

On the 25th of March, 1831, Stone presented the following application and affidavit:

"To the Register and Receiver of the Land-office at St. Stephens, Alabama:

"You will please to take notice that I, William D. Stone, of Mobile county, Alabama, claim the right of pre-emption, under the act of Congress of the 29th of May, 1830, to the fraction situated in the west part of the south-east quarter of section 22, in township 4, range 1, west of 13.

WILLIAM D. STONE."

Affidavit.—"William D. Stone, being sworn, maketh oath that the above described tract of land was planted and cultivated by him in the year 1829, and remained in his possession from the year 1829 until the 29th May, 1830, and that the said land was occupied and cultivated by him in his own right, and not as the tenant of any other person. That the said tract of land was enclosed with his own fence, and that there was no person concerned or connected with him in the cultivation of the said land, and that this present claim does not interfere with the rights of any other person; and further, that the tract described is within the present corporate limits of the city of Mobile. WILLIAM D. STONE."

The affidavit was supported by the oaths of Samuel H. Garrow and James Dowell.

*On the 20th of June, 1831, the register and receiver [*652 issued the following certificate:

E.—Extract from abstract of claims to pre-emption, under the act of 29th May, 1830.

"*Land-office, St. Stephens, Alabama.*

Abstract of claims to pre-emptions to lands that are reported to have been surveyed, but the township plats not furnished to this office.

No.	By whom claimed.	Residence.	Tract.	Sec	T.	R.	Quantity. D.	Quantity. C.	Rate. D.	Rate. C.	Amount. D.	Amount. C.
2	Jas. Etheridge,	Mobile.	S. W. qr. - - -	22	4	1 W.						
15	Wm. D. Stone.	Do.	Fraction 22 and	27	4	1 W.						
			All lying south of 31 deg. except claim No. 40.									

"*Land-office, St. Stephens, Ala., June* 20, 1831.

"It is the opinion of the undersigned, that the foregoing claimants are each entitled to the right of pre-emption, under the act of Congress of the 29th May, 1830, to the tract or tracts by them claimed, and annexed to their names respectively, in the foregoing abstract.

JOHN B. HAZARD, Register.
J. H. OWEN, Receiver."

The account of sales was entered in the book at some period which the record does not show, and was as follows:

Extract from account of land sold by register and receiver.

"Account of lands sold, and moneys entered in payment therefor, in April, 1832.

When sold.	By whom purchased. Purchaser.	Residence.	No. of Receipt.	Tract. Section.	T.	R.	Acres.	Price.	Amount.	
1832.										
April 30	James Etheridge	Mobile.	4,539	S. W. qr. 22	4 So.	1 W.	9,367	1 25	115 83	Pre-emption
"	Wm. D. Stone.	Do.	4,547	S. E. subdiv. qr. sec. 22	4 So.	1 W.	11,059	1 25	138 13	So. 31st.

On the 30th of April, 1832, the register gave to Etheridge the following certificate:

G.—*Certificate.*

"Pre-emption No. 4,539, act 29th May, 1830.

"*Land-office, St. Stephens, Ala., April* 30, 1832.

"It is hereby certified, that, in pursuance of law, James Etheridge, of Mobile county, Alabama, on this day purchased of the register of this office, the lot or south-west quarter of section number twenty-two, of township No. 4 south, in range number one west, containing ninety-two $\frac{67}{100}$ acres, at the rate of one dollar and twenty-five cents per acre, amounting to one
*653] hundred and fifteen $\frac{83}{100}$ dollars, *for which the said James Etheridge has made payment in full, as required by law.

"Now, therefore, be it known, that on presentation of this certificate to the commissioner of the General Land-office, the said James Etheridge shall be entitled to receive a patent for the lot above described.

JOHN B. HAZARD, Register."

On the same day a certificate was issued to Stone, as appears from the following extract from the record of certificates issued for lands sold.

"Record of certificates issued for lands sold, &c.

Date of certificate.	No. of certificate.	Name.	Residence.	Tract.			Quantity.		Price.		Amount	
				Sec. or part of Sec.	T.	R.	Acres.	Hdth.	D.	C.	D.	C.
1832.												
April 30	4,539	James Etheridge	Mobile Co.	Southwest 22	22	4 1 w.	92	67	1	25	115	83
"	4,547	Wm. D. Stone	Do.	S. E. sub. frac.	22	4 1 w.	110	80	1	25	138	15

On the 17th of December, 1832, a patent was issued to Stone. It granted the land described in the following preamble:

"Pre-emption certificate, No. 4,549.—The United States of America, to all to whom these present shall come, greeting:

"Whereas William D. Stone, of Mobile, has deposited in the General Land-office of the United States a certificate of the register of the Land-office at St. Stephens, whereby it appears that full payment has been made by the said William D. Stone, according to the act of Congress of the 24th of April, 1820, entitled "An act making further provision for the sale of the public lands," for the south-east subdivision of

fractional section twenty-two, in township four, south of range one west, in the district of lands subject to sale at St. Stephens, Alabama, containing one hundred and ten acres and fifty one-hundredths of an acre, according to the official plat of the survey of said land returned to the General Land-office by the surveyor-general, which said tract has been purchased by the said William D. Stone.

"Now know ye," &c., &c.

On the 30th of May, 1833, a patent was issued to Etheridge for the land described in the preamble.

"Pre-emption certificate, number 4,539.

"The United States of America, to all to whom these presents shall come, greeting:

"Whereas, James Etheridge, of Mobile county, Alabama, has deposited in the General Land-office of the United States a certificate of the register of the Land-office at St. Stephens, whereby it appears that payment has been made by the said James Etheridge, *according to the provisions of the act of Congress of the 24th April, 1820, entitled "An act making further provisions for the sale of the public lands," for the south-west quarter of section twenty-two, in township four, south of range one west, in the district of lands subject to sale at St. Stephens, Alabama, containing ninety-two acres and sixty-seven hundreths of an acre, according to the official plat of the survey of the said lands returned to the General Land-office by the surveyor-general, which said tract has been purchased by the said James Etheridge. [*654

"Now know ye," &c., &c.

In April, 1838, Brown and wife, claiming under the title of Etheridge, brought an ejectment against Clements for the east half of the south-west quarter of fractional section twenty-two. The case came on for trial at the April term, 1841, in the Circuit Court of the state of Alabama, for the county of Mobile, in the course of which the following bill of exceptions and agreement were filed.

Bill of Exceptions.

"Be it remembered, that upon the trial of this cause, the plaintiffs gave in evidence the paper hereto annexed, marked A, being a duly certified copy of a patent from the United States government to James Etheridge; and thereupon, it was admitted by the defendants, that the plaintiffs had, at the date

of the demise, and time of trial, all the rights of said patentee Etheridge in the land described in the declaration. Plaintiffs also gave in evidence paper marked B, hereto annexed, being a plat of a survey made and returned, under an order of this court, by the surveyor for the county of Mobile, and proved by said surveyor that said survey was truly made, according to said order, and that the plat returned shows correctly the external lines and corners of said fractional section twenty-two. That he found the south-west corner of said fractional section, as shown by the plat returned; and also found, on the section lines of said fractional section, the half mile posts, each post being a half mile from the south-west corner of said fractional section. That these posts bore evidence of being those put down by the United States surveyor, on running the section lines. That an entire south-west quarter exists in said fractional section, without interference with any private land claim, and leaving a residuum both on the north and on the east of said quarter-section, as shown by the plat returned by him; and also, that said fractional section contains two hundred and ten acres. The defendants admitted that they were in possession, at the time of service of the declaration, of sixteen acres of the land described in the declaration. The defendants gave in evidence, by consent of plaintiffs, a certified copy of a patent from the United States government to William D. Stone, hereto annexed, marked No. 1; and thereupon, it was admitted by the plaintiffs, that the defendants *655] have all the rights of the said patentee, Stone, in *the land admitted to have been in their possession at the time of the service of the declaration.

"The defendants offered in evidence duly certified copies of the official township plats of 1832 and 1835, of the township in which the land sued for is situated, (extracts from which are hereunto annexed, marked No. 2,) to show the boundaries and contents of the land described in said patents to said Etheridge and to said Stone, without having offered, or professing to have any other evidence than the plats themselves afford, to prove that the subdivision, corners, and lines dividing said fractional section, as exhibited in the said plats, had been run and marked on the ground. To the admission of which evidence the plaintiffs objected; and their objection was overruled, and said plats allowed to go to the jury. The plaintiffs admitted, that if the line, as marked on said extract from plats (No. 2) dividing lots A and B, is a legal line, lot B, as exhibited, will cover the land sued for.

"The plaintiffs further gave in evidence, that the said line and corners, as exhibited on the extract, (No. 2,) had never

been run or marked on the ground; and also gave in evidence papers marked C, D, E, F, G, H, being duly certified transcripts of records from the Land-office at St. Stephens, Alabama.

"The defendants gave in evidence paper marked No. 3, being a duly certified copy of the instructions of the Secretary of the Treasury, bearing date the 10th day of June, 1820, also 20th January, 1826.

"The plaintiffs gave in evidence paper marked I, being a duly certified copy of the circular of the Secretary of the Treasury, of date the 8th day of May, 1832.

"Upon the foregoing evidence, the court instructed the jury, that if they believed the same, they must find for the defendants. The court further instructed the jury, that if said fractional section (No. 22) was capable of being subdivided into an entire south-west quarter-section and two half quarter-sections, leaving a residuum as shown by the said map and evidence of the county surveyor, still the surveyor-general was not required, under the acts of Congress providing for the subdivision of the public land, and the instructions of the Secretary of the Treasury, made under the act of the 24th of April, 1820, entitled 'An act making further provision for the sale of the public lands,' to make, in his subdivision of the same, either such quarter-section or half quarter-sections, but might lawfully subdivide the same into two lots, (A and B,) as indicated by said plat of 1832; and that under said evidence, Etheridge's title would not hold the whole south-west quarter of said fractional section, but only lot A, and that Stone's title would hold lot B, being the balance of said fractional section.

"To which instructions, and each and every of them, the plaintiffs, *by their counsel, except, and pray the court to sign and seal this their bill of exceptions. [*656

E. L. DARGAN. [SEAL.]"

Agreement of the parties:—

"The parties to this cause, not wishing to encumber the record by copying from the book entitled 'General Public Acts of Congress respecting the sale and disposition of the public lands, with instructions issued from time to time by the Secretary of the Treasury and commissioner of the General Land-office, and official opinions of the attorney-general on questions arising under the land laws,' and which instructions are contained in the 2d volume, part 2d, prepared and printed by order of the Senate, agree that said book may be used by either party, and any thing therein contained read as illustra-

tion of the practice of the Land-office, and construction that the acts of Congress had received in that branch of the government. The same work can be referred to by either party in the Supreme Court, for the purpose aforesaid. The parties further agree, that for exhibit No 2, being the official map of the survey of the township described in the patents of both plaintiffs and defendants, the map contained in the same book above described, between pages 134 and 135, shall be referred to as if the same was incorporated with, and formed a part of the record in this cause.

SHERMAN & CHAMBERS,
Attorneys for plaintiffs.
GORDON, CAMPBELL & CHANDLER,
Attorneys for defendants."

The jury having found for the defendants under the above instructions, the case was carried to the Supreme Court of the state of Alabama, where the opinion of the court below was affirmed.

A writ of error brought it to this court.

Willis Hall and *Sherman*, for the plaintiff in error.
Jones, for the defendants in error.

Hall stated the case, and claimed the entire quarter-section. It was not within the exceptions of the act of 1830, being neither reserved nor appropriated. The agent of the United States cannot prescribe any other conditions than those which are found in the law. The south-west quarter of section 22 is a specific thing. A patent was issued to Etheridge for it. It is true that the patent says that it contains only ninety-two acres and sixty-seven hundredths, but this is mere surplusage, and does not detract from the legal efficacy of the grant. 6 Cow. (N. Y.), 706.

The defendant in error settled upon the south-east quarter, but there were previous claims to a part of it, which had a preference, and he only claimed what remained. Stone's claim to the south-east quarter was put in three months after ours. In order to effect a valid title under the pre-emption law, three things are required.

*657] *1. The land must belong to the United States, and be unappropriated.

2. It must conform to the regular and legal subdivisions.

3. The settlement must be upon the quarter-section which is claimed.

The patents of the parties in this case do not clash with

each other. One is for the south-west quarter-section, and the other for the south-east subdivision. A subdivision is not a legal term, and is synonymous, in this case, with quarter. The part claimed by the defendant in error is called by different names, for example, "a fraction of 22," "south-east subdivision," "fraction and south-east subdivision," and "south-east sub-fraction." They all mean the same thing, which is, a fractional part of the south-east quarter-section. The dispute has arisen because the surveyor has drawn a line not authorized by law, dividing the section into two parts. The authority which is supposed to exist for such a line is the law of 1820, (1 Land Laws, 323;) but we say that this law does not apply to the case, or if it does, that it is controlled by the act of 1830, which says that we are entitled to a quarter-section. But these laws are not inconsistent with each other. 13 Pet., 498.

All the laws, beginning with the ordinance of 1785, which directs the public lands to be laid off into townships, and coming down to the law of 1832, (1 Land Laws, 493,) have the same system in view, viz.: running the lines geographically, and laying the land off into squares. The acts of 1804 and 1805, (1 Land Laws, 104, 108,) requiring lands to be laid out and offered for sale in quarter-sections, are unrepealed, for the act of 1820 refers to them, and recognizes the same mode of running out the lines. Laws must be construed together. Dwar. Stat., 674. The act of 1820 supposes that the land is already laid off in quarter-sections, and not that new lines are to be run. The reference to the rules which the Secretary of the Treasury is authorized to prescribe, is to the manner of executing the established provisions of existing laws, and not that the system itself should be changed. The word "fraction" in the law must be construed to mean the piece which is left after a quarter-section is carved out. The object of all the land laws (which Mr. *Hall* examined in detail) is twofold. 1st. To avoid a conflict as to boundaries, because each man's possession is a regular geometrical figure; and, 2d. To guard against favoritism and partiality, by requiring the whole figure to be purchased. After the surveyor-general had run these lines, he was *functus officio*, and had no right to obliterate them, unless by a fresh act of Congress. We contend:

1. That this quarter-section is given to us by the act of 1830.

2. That there have been no laches on our part.

3. That we have the higher equity, our claim being two or three months earlier than that of the other side.

*Sherman here gave notice, that in his reply, he should refer to the following authorities. 6 Cranch, 237; 1 Paine, 494; 4 Wash. C. C., 45; 2 Port. (Ala.), 42, 43; 7 Id., 351, 360, 432; 3 Stew. (Ala.), 76; 1 Pet., 655; Stat. Ala., 283; 13 Pet., 436, 498; 4 La., 547; 13 Id., 547; 1 Id., 56.

Jones, for defendant in error.

Both patents can stand. The parties are both pre-emptioners, and entered and paid for their land on the same day, and received certificates for it. Our patent is the elder. What does it grant? The description of the property is, the "south-east subdivision," &c., "according to the official plat of the surveyor." We must, therefore, look at the official survey, returned before the patent issued. It is the same thing as if it had actually been inserted in the body of the patent. There are two subdivisions marked upon it, and no one can doubt which is the south-eastern. It corresponds, also, with the original entry, which we find to be one hundred and ten and a half acres. The patent contains the exact technical description of the land, as claimed by us.

The argument upon the other side is, that the surveyor-general had no right to lay off the land in these two subdivisions, and that his act, being illegal, is void. But if he has done an illegal act, does that destroy our title? This section is a fractional one, containing only two hundred and three acres, forty-three more than a quarter-section. Were we bound to divide this into half or quarter-sections? Had not the Secretary of the Treasury power to adapt the mode of laying it out to the state of the country? The act of Congress was prospective, and designed to provide for just such a case as this. What is left of the section, after satisfying elder claims, is singularly shaped, and could not have been laid out into squares.

It is made an objection to the subdivision by the surveyor, that the dividing line was never run and marked upon the ground. But if this be sound, it will impeach every title made under that survey. The irregularity of the figure is no objection to the subdivision, for the act of 1820 provides for the case. It directs whole sections to be laid off by north and south lines, but fractional sections are left to the judgment of the Secretary of the Treasury. The act of 1830 introduces no new system for the benefit of pre-emptioners, but refers to the system which was then in existence. Under it, if an entire quarter-section had been laid out, there would have been only forty acres left, and if several claimants had

been living on it, it would have been impossible to divide the land amongst them all.

Sherman, in reply, laid down the following propositions:

1. That Etheridge's patent, legally construed, will hold the whole * "south-west quarter" of fractional section number 22, according to his claim, allowance, and right, [*659 under the pre-emption law.

2. That Stone's patent for the "south-east subdivision" of said section, legally construed, will hold only the south-east legal subdivision of the same; and that the south-east fractional quarter is such south-east "legal subdivision," according to his claim and right under the pre-emption law.

3. That if the patents cannot be legally so construed as to avoid conflict, yet that Etheridge's preliminary title, and rights under the pre-emption law, are sufficient to authorize the plaintiffs to recover; and that under the statutes of Alabama, the certificate issued to Etheridge, which is older than the certificate or patent to Stone, is sufficient to authorize the plaintiffs to recover.

These lands were surveyed in 1820, and the corners marked. It is stated in the record that they found the south-west corner and the half-mile posts all marked. Etheridge's patent includes the whole of the south-west quarter, and the granting clause is not restrained by a reference to the number of acres, which is merely descriptive. See the authorities already cited, and also, 5 Mason, 410; 1 Pet., C. C., 496; 6 Cow. (N. Y.), 706.

The pre-emption act of 1830 says that persons must take some legal subdivision. The direction is positive on this subject. The south-west quarter was such a subdivision, and created in 1820, when the lines were run. There were three corners established then, and any one could run the fourth line: and the fact of the case is, that these section lines are the only ones which were ever run. The system was adopted in 1805. Under it, quarter-sections could be found without being run out, because half-mile posts were put down. The law, then, created this quarter-section, which was established as soon as the posts were planted. Etheridge lived in sight of a post. The lines which the surveyor makes upon paper are not boundaries, but are merely indicative of subdivisions which the law has created. 5 How. (Miss.), 751.

A quarter-section is a definite, precise, legal thing. 2 Laws and Instructions, 180, 181, 183, 184, 187; 4 Stew. & P. (Ala.), 396; 7 Port. (Ala.), 432.

Etheridge's patent is not for the lot A, which runs into the north-west quarter-section.

The act of 1805 speaks of corners and lines not run out; and the second section of the act of 1796 (Land Laws, 51,) shows what the surveyor-general must return, by directing that his plat must be made up from field books. 2 Port. (Ala.), 40; 3 Stew. (Ala.), 76; 7 Port. (Ala.), 432, 434, 435; 3 Stew. (Ala.), 396. These two certificates being issued by the same officer, on the same day, must be interpreted so as to avoid a conflict between them. Lot A cannot be held under Etheridge's patent, because it runs out of the south-west *660] quarter. Stone's is described to be the south-east *sub-division; but what is that, and how can it be found, as no lines were ever run upon the ground? 2 Land Laws, 303, 820, 787, 999, 826, 827.

In instructions from the commissioner, dated January 20, 1826, a fractional section is defined to be "a tract of land not bounded by sectional lines on all sides, in consequence of the intervention of a navigable stream, or some other boundary recognized by law, and containing a less quantity than six hundred and forty acres;" and the surveyor is directed, in "subdividing fractional sections, containing one hundred and sixty acres and upwards," to "designate as many full half-quarter-sections as practicable, and the residuary lot will then be a fraction of the fractional quarter-section of which it forms a part. 2 Land Laws, 853, 854, 921, 933, 934, 136.

Mr. Justice McKINLEY delivered the opinion of the court.

This case comes before this court on a writ of error to the Supreme Court of the state of Alabama.

The plaintiffs brought an action of ejectment against the defendants, in the Circuit Court for the county of Mobile, in said state; and upon the trial, they read in evidence the following claim and entry: "To the register and receiver of the Land-office at St. Stephens: You will please take notice, that I, James Etheridge, of Mobile county, Alabama, claim the right of pre-emption, under the act of Congress, of the 29th of May, 1830, to the south-west quarter-section 22, township 4, range 1 west;" and that on the 28th day of January, 1831, the said James Etheridge made the necessary proof that he had planted and cultivated said quarter-section in the year 1829, and remained in possession until after the 29th day of May, 1830. The plaintiff also read in evidence a patent from the United States, bearing date the 30th day of May, 1833, reciting that, "Whereas James Etheridge, of Mobile county, Alabama, has deposited in the General Land-office of the

United States, a certificate of the register of the Land-office at St. Stephens, whereby it appears that payment has been made by the said James Etheridge, according to the provisions of the act of Congress of the 24th of April, 1820, entitled 'An act making further provision for the sale of the public lands,' for the south-west quarter of section 22, in township 4, south of range 1 west, in the district of lands subject to sale at St. Stephens, Alabama, containing ninety-two acres and sixty-seven hundredths of an acre, according to the official plat of the survey of the said lands, returned to the General Land-office, by the surveyor-general, which said tract has been purchased by the said James Etheridge:

"Now know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress, in such case made and provided, have given and granted, and by these presents do give and grant, unto the said James Etheridge, and to his heirs, the said tract, above described," &c.

*In obedience to an order of the Circuit Court, the surveyor of Mobile county went upon the land in controversy, and made an actual survey, and returned a plat thereof into court, showing that the section 22 was covered by private land claims, except the whole of the south-west quarter, on which James Etheridge had made his entry; and a small fraction in the south-east quarter, entered, under the pre-emption law, by William D. Stone; and a fraction in the north-east and north-west quarters of said section; which plat was given in evidence to the jury. And the plaintiffs proved, by the surveyor, that he found the south-west corner of said fractional section as shown by the plat returned; and also found, on the section-lines of said fractional section, the half-mile posts, each post being half a mile from the south-west corner of said fractional section; that these posts bore evidence of being those put down by the surveyor of the United States, on running the section lines; that an entire south-west quarter-section exists in said fractional section, without interfering with any private land claim, leaving a residuum on the north and the east of said quarter-section. [*661

The defendants gave in evidence to the jury the following claim and entry, made by the said William D. Stone: "To the register and receiver of the Land-office at St. Stephens Alabama: You will please take notice, that I, William D. Stone, of Mobile county, Alabama, claim the right of pre-emption, under the act of Congress, of the 29th of May, 1830, to the fraction situated in the west part of the south-east quarter of section 22, in township 4, range 1 west of 18."

And on the 25th of March, 1831, he made the necessary affidavit and proof to show that he had planted and cultivated the above described tract of land, according to said act of the 29th of May, 1830. And they also gave in evidence the following patent: "The United States of America to all to whom these presents shall come, greeting: Whereas William D. Stone, of Mobile, has deposited in the General Land-office of the United States, a certificate of the register of the Land-office at St. Stephens, whereby it appears that full payment has been made by the said William D. Stone, according to the act of Congress, of the 24th of April, 1820, entitled 'An act making further provision for the sale of the public lands,' for the south-east subdivision of fractional section 22, in township 4 south, of range 1 west, in the district of lands subject to sale at St. Stephens, Alabama, containing one hundred and ten acres and fifty-one hundredths of an acre, according to the official plat of the surveyor of said land, returned to the General Land-office by the surveyor-general; which said tract has been purchased by the said William D. Stone: Now know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant, unto the *662] said William D. Stone, and his heirs, the said tract above described," &c. *And it was admitted by the plaintiffs, that the defendants had all the rights of said Stone in the land admitted to have been in their possession, at the time of the service of the declaration; and the defendants admitted that the plaintiffs had, at the date of the demise, and time of trial, all the rights of said patentee, Etheridge, in the land described in the declaration.

And the parties "not wishing to encumber the record, by copying from the book entitled 'General Acts of Congress respecting the sale and disposition of the public lands, with instructions issued, from time to time, by the Secretary of the Treasury, and commissioner of the General Land-office, and official opinions of the attorney-general, on questions arising under the land laws;' and which instructions in the 2d vol., part the 2d, prepared and printed by the Senate, agree that said book may be used by either party, and any thing therein contained read as illustration of the practice of the Land-office, and construction that the acts of Congress had received in that branch of the government. The same work can be referred to, by either party, in the Supreme Court, for the purpose aforesaid. The parties further agree that the exhibit, No. 2, being the official plat of the survey of the township

described in the patents of both plaintiffs and defendants, between pages 134 and 135, shall be referred to as if the same was incorporated with, and formed a part of the record in this cause." This statement furnishes all the evidence deemed necessary and pertinent to the investigation of the questions involved in the principal instruction of the Circuit Court, to the jury, on the trial of the cause; which instruction is as follows: "The court further instructed the jury, that, if said fractional section, No. 22, was capable of being subdivided into an entire south-west quarter-section, and two half-quarter-sections, leaving a residuum, as shown by said map and evidence of the county surveyor, still the surveyor-general was not required, under the acts of Congress, providing for the subdivisions of the public lands, and the instructions of the Secretary of the Treasury, made under the act of the 24th of April, 1820, entitled 'An act, making further provision for the sale of the public lands,' to make in his subdivision of the same, either such quarter-section, or half-quarter-sections; but might lawfully subdivide the same into two lots, A and B, as indicated by said plat of 1832; and that under said evidence, Etheridge's title would not hold the whole south-west quarter of said fractional section, but only lot A; and that Stone's title would hold lot B, being the balance of said fractional section." To this instruction the plaintiffs excepted.

Upon the construction here given to the act of Congress, and to the instructions of the Secretary of the Treasury thereon, referred to in the above instruction of the court, depends the whole controversy between the parties to this suit. The 1st section of the act of Congress, above referred to, is in these words: "That from and after *the first [*668 day of July next, all the public lands of the United States, the sale of which is, or may be, authorized by law, shall, when offered at public sale to the highest bidder, be offered in half-quarter-sections; and when offered at private sale, may be purchased, at the option of the purchaser, either in entire sections, half sections, quarter-sections, or half-quarter-sections; and in every case of the division of a quarter-section, the line for the division thereof shall run north and south, and the corners and contents of half-quarter-sections, which may hereafter be sold, shall be ascertained in the manner and on the principles directed and prescribed by the second section of an act, entitled 'An act concerning the mode of surveying the public lands of the United States,' passed the 11th day of February, 1805, and fractional sections, containing one hundred and sixty acres, or upwards, shall, in like manner, as nearly as practicable, be subdivided into half-quarter-sections, under such rules

and regulations as may be prescribed by the Secretary of the Treasury." 3 Story Laws, 1774.

The settled policy of Congress has been to survey the public lands in square figures, running the lines north and south, and east and west, and to extend the subdivisions authorized by law, as far as practicable, in square figures, to the lowest denomination.

The second section of the act of the 18th of May, 1796, chap. 29, directs that the public lands "shall be divided by north and south lines, run according to the true meridian, and by others crossing them at right angles, so as to form townships six miles square, unless where the line of the late Indian purchase, or of tracts of land heretofore surveyed or patented, or the course of navigable rivers may render it impracticable, and then this rule shall not be departed from further than such particular circumstances may require." After directing how townships should be divided into sections, it directs that "fractional townships shall be divided into sections in manner aforesaid, and the fractions of sections shall be annexed to, and sold with, the adjacent entire sections." 1 Story Laws, 422. The lowest denomination authorized by this act, was sections; but the direction to the surveyor was to divide the fractional townships into as many sections as the particular circumstances would permit. And so by the 1st section of the act of the 24th of April, 1820, the surveyor is directed to subdivide fractional sections, containing one hundred and sixty acres and upwards, into as many half-quarter-sections as practicable, by running the lines north and south. And this statute conferred no power on the Secretary of the Treasury to make any regulation, by which a fractional section might be divided into any quarter, or other subdivision than half-quarter-sections. The only authority he acquired by the statute, was to make such rules and regulations as would enable the surveyor to make the greatest number of half-quarter-sections out of a fractional section, by running the lines north
*664] and south, or east and west; and this *power he executed, by his circular letter, to the surveyors-general, of the 10th of June, 1820, 2d part, Public Land Laws, &c., 820.

Had the surveyor-general subdivided the fractional section 22, now in controversy, according to law, there would have been two half-quarter-sections in the south-west quarter, making that quarter complete, a fractional section in the south-east quarter, and a fractional section in the north-east and north-west quarters, making four tracts or subdivisions instead of two, as returned by him to the Land-office of the district. None of the lines, subdividing sections, are required by law

to be made by actual survey, and marked on the land; but they are to be delineated on the township plats, according to the 2d section of the act of the 11th of May 1805, chap. 74, referred to in the act of the 24th of April, 1820, (2 Story Laws, 961.) When the township and section lines are run, and the corners marked according to law, the quarter-section lines are ascertained on the plat by protracting lines across the section north and south, and east and west, equi-distant from the section lines; and so of other subdivisions. And a surveyor going on the land to ascertain the boundary of a quarter, or half-quarter section, would do it with as much ease and certainty as if it had been delineated on the plat by the surveyor-general. Extending the subdividing lines on the township plats, is not, therefore, essentially necessary to enable the register to sell the land, or to give title to the purchaser. The register is as much bound to know what is a legal subdivision of a section, or fractional section, as is the surveyor-general.

Because he is directed by law to offer the lands, when sold at public sale, in half-quarter-sections. To enable him to perform this duty, he must know what a half-quarter-section is. And before he can offer a fractional section for sale, he must see that it has been subdivided, so as to enable him to offer as much of it in half-quarter-sections as practicable. When Etheridge applied to purchase the south-west quarter of this fractional section at private sale, as he had a right to do, under the act granting pre-emption rights, the register was bound to know whether such a subdivision could be obtained according to law. A bare inspection of the township plat must have satisfied him, in this case, that it was practicable to obtain an entire quarter-section in the south-west corner of the fractional section 22. The 1st section of the act of the 24th of April, 1820, directed that this fractional section should be divided into as many half-quarter-sections as practicable, by lines north and south; and the instructions given by the Secretary of the Treasury, under this act, directed that it should be divided into half-quarter-sections, by north and south, or east and west lines, so as to preserve the most compact and convenient forms.

There is nothing in any of the acts of Congress, nor in the instructions of the Secretary of the Treasury, to authorize the division of *this fractional section made by the surveyor-general, and it being a violation of the law, and contrary to the duties of his office, it must be regarded as a void act. *Miller and others* v. *Kerr and others*, 7 Wheat., 1. So far as Stone's claim was concerned, this division of the frac- [*665

tional section has been treated by the register and the commissioner of the General Land-office as a legal subdivision, and the register seems to have disregarded entirely the act granting pre-emption rights, and Stone's claims and proofs under it, and to have transferred his claim to the western lot of the fractional section as divided by the surveyor-general. The certificate of the register, recited in the patent of Etheridge, takes no notice of this subdivision of the fractional section, but states that Etheridge had "purchased of the register the lot or south-west quarter of section, number 22," &c. The patent is for the whole of the south-west quarter of section 22, by its proper designation, and if no quantity of land had been expressed in it, all the land contained in the quarter-section would have passed by the patent to Etheridge; because, by the 2d section of the act of the 11th of February, 1805, before referred to, it is provided that "half-sections and quarter-sections, the contents of which have not been returned, shall be held and considered as containing the one-half, or the one-fourth respectively, of the contents of the section of which they make part." The surveyor failed to return the contents of the quarter-section in this case; it was liable, therefore, to be sold by the above rule. But it has been insisted that Etheridge, and those claiming under him, were bound, and concluded by the number of acres expressed in the patent. It is evident the quarter-section was not referred to for the number of acres contained in it; but by express words reference was made to the plat returned by the surveyor-general, showing the division of the fractional section into two parts, one of which contains the number of acres expressed in Etheridge's patent, and the other the number of acres expressed in Stone's patent. It has been already shown that this plat was illegal, and the subdivision of the fractional section void; and any reference, therefore, to this plat, to show the number of acres granted to Etheridge, is illegal and inconsistent with every previous step taken towards perfecting his title, and utterly repugnant to the previous words of grant used in the patent.

Thus it appears, that neither the claim of Etheridge, filed with the register, the certificate of purchase issued by him, nor the patent issued to Etheridge by the commissioner of the General Land-office, is founded on the division of the fractional section made by the surveyor-general; but the whole appears to be founded on the subdivision of the fractional section into one quarter-section, and two fractional sections, made by actual survey on the land. It is true that, in undertaking to state the quantity of land contained in the quarter-section,

reference is made to what is there called the official plat of the lands returned to the General Land-office by the surveyor-general; *which is nothing more than a reference [*666 to this same subdivision of the fractional section so often mentioned. But this question necessarily arises: How can the contents of either division of the fractional section, thus divided into two lots or subdivisions, show the contents or number of acres in the south-west quarter of the same section? The ninety-two acres and sixty-seven hundredths of an acre mentioned in the patent, is the number of acres contained in the western subdivision of said fractional section, and consists of part of the south-west, and part of the north-west quarters of the fractional section, as appears by the plat used on the trial. No part of the north-west quarter of this fractional section can by any reasonable construction be considered as being within and part of the land included in a patent for the south-west quarter of the section. This proves that the reference to this plat, in Etheridge's patent, is both delusive and illegal, and must, therefore, be rejected as void and inoperative.

The act of the 29th of May, 1830, to grant pre-emption rights to settlers on the public lands, chap. 209, appropriated this quarter-section of land, on which Etheridge was then settled, to his claim, under the act, for one year, subject, however, to be defeated by his failure to comply with its provisions. During that time, this quarter-section was not liable to any other claim, or to be sold to any other person, except at public sale, under the proclamation of the President of the United States; and that Etheridge had a right to prevent, by paying for it as directed by the act. And as he has complied with all the requisitions of the act, as far as the mistakes and illegal acts of the ministerial officers of the government would permit, he has acquired a good title by his patent, against the United States, for the whole of said south-west quarter-section. The remaining question is, whether Etheridge's title is good against Stone's patent? Stone claimed "the right of pre-emption, under the act of Congress of the 29th of May, 1830, to the fraction situated in the west part of the south-east quarter of section 22, in township 4, range 1 west." This claim confined his pre-emption right to that specific fraction. And although the act gave to every settler on the public lands the right of pre-emption of one hundred and sixty acres, yet if a settler happened to be seated on a fractional section, containing less than that quantity, there is no provision in the act by which he could make up the deficiency,

out of the adjacent lands, or any other lands.[1] The only case provided for in the act, by which the pre-emptioner had the right to enter land outside of the quarter, or fractional section, on which he was settled at the passage of the act, is the case provided for in the 2d section. When two or more persons were settled on the same quarter-section, it might be divided between the two first settlers, and each be entitled to a pre-emption of eighty acres of land elsewhere, in the same land-district. But, in this case, Stone was not only permitted
*667] to take *land, outside of the fractional section on which he was settled, but he was permitted to take land on which Etheridge was settled, and to which he had previously proved his right under the same act of Congress.

In the case of *Lindsay and others* v. *Miller and others*, 6 Pet., 674, the plaintiffs in ejectment claimed title under a patent, dated the 1st of December, 1824, founded on an entry and survey made in the same year. The defendants claimed title under an entry, made in January, 1783, upon a military warrant, for services rendered in the Virginia state-line, and a survey made thereon, in the same month, and recorded on the 7th of April, of the same year, and a patent issued by the state of Virginia, in March, 1789. This land lay in what is called the military district, between the rivers Scioto and Little Miama, in the state of Ohio. This district had been reserved, in the deed of cession, dated the 1st of March, 1784, made by Virginia to the United States, to satisfy the claims of the Virginia troops on continental establishment, in the event of there not being sufficient good land for that purpose, in a reservation previously made by Virginia, on the south-east side of the Ohio river. Although the defendants proved possession, under this title, for upwards of thirty years, the entry, survey, and patent, were adjudged by the court to be void, on the ground that the land had been reserved for the satisfaction of military warrants, granted for services of the Virginia troops on continental establishment, and was not, therefore, subject to entry upon warrants for services rendered in the Virginia state-line.

In the case before the court, all the land in the south-west quarter of the fractional section had been appropriated, by law, to satisfy Etheridge's claim, and no other land could be substituted in lieu of that quarter-section, for any part of it. Stone's claim arose under the same law, and by the same provisions was confined to the fraction in the west part of the south-east quarter of the same section, and gave no right to

[1] RELIED ON. *Lyttle* v. *Arkansas*, 9 How., 334.

land elsewhere. So much of the patent to Stone as purports to grant land within the south-west quarter of the section, is, therefore, not only an appropriation of land to his claim, not subject to it according to the act, but which, by the same act, had been appropriated to another claim, arising under the same act, concurrent with and equal in all respects to Stone's claim. How, then, could his patent give him title to land that was not subject to his claim; land that he never had legally claimed; and to land that, by law, had been appropriated to and claimed by another? It seems to us, this case is clearly within the principles settled in the case above referred to, and that the patent granted to Stone is void, for so much of the land included in it as lies within the said south-west quarter of the fractional section, and for which Etheridge holds a patent.

It has been insisted, however, that as Etheridge only paid for the quantity of land mentioned in his patent, that he can have no right *to land paid for by Stone, and included in his patent. This is one of the results of the mis- [*668 taken and illegal acts of the ministerial officers of the government, which, as already shown, can neither benefit one party, nor prejudice the rights of the other. The United States have received full payment for all the land contained in both patents. And if Stone has paid for land which belonged to Etheridge, that is a matter to be adjusted between themselves, amicably, or by law, as they may choose.

Upon a full view of the whole case, it is the opinion of the court, that the judgment of the Supreme Court of Alabama be reversed.

Mr. Justice CATRON.

I feel myself bound to dissent, from the foregoing opinion —for the following reasons:

1. By the act of 29th May, 1830, a pre-emption right settler then in possession was entitled to enter with the register of the Land-office in the district where the land lay, by legal subdivisions, not more than one hundred and sixty acres.

The controversy before us turns, partly, on what was the true "legal subdivision" of fractional section 22, containing two hundred and three acres: This must be ascertained from the laws on the subject existing in 1830. The lines of public surveys actually run and marked in the field, are township extensions, and section boundaries; the lines dividing sections into quarters, half-quarters, (and quarter-quarters since 1832,) being only indicated, or depicted upon the township plats returned and recorded in the office of the register.

The act of 26th March, 1804, provides for the first time for the sale of the public lands in quarter-sections; and also directs (sect. 9) that fractional sections shall be sold entire; or by uniting two or more together. The act of February 11th, 1805, directs with absolute precision, leaving no discretion on the subject, the manner in which full sections shall be divided into quarters: but makes no provision for the subdivision of fractional sections. It was not until the passing of the act of April 24, 1820, that these were authorized to be subdivided; and then only when they contained more than one hundred and sixty acres. The act of 1820, in directing the manner in which full sections shall be subdivided into half-quarters, or eighty acre lots, is as absolutely precise in its provisions as that of 1805; and, as in the former case, gives no discretionary power so far as these subdivisions are concerned—but in authorizing the subdivision of fractional sections containing one hundred and sixty acres and upwards, it directs that they shall in like manner, "as nearly as practicable," be subdivided into half-quarter sections, or eighty acre lots—"under such rules and regulations, as may be prescribed by the Secretary of the Treasury." Under the discretionary power here given, rules and regulations were prescribed by Secretary Crawford, on the 10th of June, 1820, (2 Land Laws
*669] and Opinions, *p. 820, No. 796.) A circular was addressed to the surveyors-general of that date, for their government in this respect, by the commissioner of the General Land-office: It orders that fractional sections, containing more than one hundred and sixty acres, shall be divided into half-quarter sections, by north and south, or east and west lines, so as to preserve the most compact and convenient forms. "You will, therefore," says the commissioner, "be pleased to divide the fractional sections in your district, (which remain unsold,) in the manner above directed, and report to this office, and to the registers of the land-district in which those fractions respectively are situate, the subdivisions, together with the quantity in each. It is not intended to run the subdivisional lines, and mark them, but merely to make them upon your surveys, and calculate the quantity of land in each subdivision."

In January, 1826, (2 Land Laws, p. 583, No. 841,) further instructions were given on this subject, to the surveyor-general at Washington, Mississippi. The commissioner says, among other things—"A fractional section is a tract of land not bounded by sectional lines on all sides, in consequence of the intervention of rivers, &c., and containing a less quantity than six hundred and forty acres."

Speaking of the regulations, and the circular letter founded on them, the commissioner continues: "The substance of the rule is, that fractional sections of one hundred and sixty acres and upwards are to be subdivided by east and west, or north and south lines, at the discretion of the surveyor, so as to preserve the most compact and convenient forms. Each lot to be, as nearly as practicable, a half-quarter-section, containing a quantity of eighty acres; sometimes rather more, sometimes less, as the locality demands."

According to these instructions, fraction No. 22 was divided: two precise eighty-acre tracts could not be made out of it; half-quarters, or eighty acres, was the least quantity that could be sold by the act of 1820, if in regular form and part of a full section; but if in irregular form, and the fraction of a section, containing upwards of one hundred and sixty acres, then it was left to the Secretary to cause it to be subdivided according to his own regulations, into two or more tracts, approaching, "as nearly as practicable," to eighty acres each. He directed the subdivisions to be made in all cases so as to preserve the most compact and saleable forms, accommodating the tracts to the sides of rivers, or other legal intervening boundaries to subserve the best interests of the government. This practice has prevailed as the governing rule for nearly a quarter of a century, and is now in full operation—large quantities of land have been sold thus subdivided; and great quantities yet remain to be sold. I speak on information derived from the commissioner of the General Land-office. The idea of taking out of a fraction a quarter-section of one hundred and sixty acres, if found there, as if the section was entire, and leaving surrounding strips of a few acres each, unsaleable *and of little or no value, as will be [*670 the case here, never has been entertained at that office, as the true construction of the act of 1820, from the date of Mr. Crawford's instructions, (June 10th, 1820,) up to this time. On mature consideration, I think the instructions given legitimately within the authority conferred on the Secretary. In this view of the law, as applicable to the present case, I am supported by the opinion of the attorney-general, given on Etheridge's claim in 1837, (2 Land Laws and Opinions, p. 136, No. 85.)

2. Suppose, however, it was doubtful whether they were or not authorized, is it admissible for the courts of justice, after such a lapse of time, to call in question the construction given to the act; to disturb so many titles taken under it—and to break up existing subdivisions? The sole authority to which the act referred for its exposition, and the prescribing of rules

and regulations to carry it into execution, was the Secretary of the Treasury. His jurisdiction was subject to no supervision; he was constituted the only judge, from whose decision there was no appeal on part of purchasers; they were compelled to buy in the form, and quantity, the lands were offered for sale, or not be permitted to purchase at all. The Secretary having adjudged and settled the construction of the act according to his views of its true meaning, and this coeval with its passage—a strong circumstance: the government in its executive and political departments, and the community at large concerned in purchasing from the government, having acquiesced without complaint, recognizing the construction as the true one, through so great a lapse of years, it is now supposed by me, the duty of this court, on the question being presented here, and that for the first time, to acquiesce also. That these subdivisions are for the best interests of the United States is manifest; all others have abided by them, and so should the plaintiff.

If one of our own judgments made in 1820, coeval with the statute, had produced similar consequences; if many thousands of titles rested on it, (as there surely do on Mr. Crawford's instructions,) I should feel myself wholly unauthorized, at this day, to overthrow the decision, however doubtful I might think it to be. The conservative rule of *communis error facit jus*, is universal in courts of justice, in regard to their own judgments, under such circumstances; and undoubted judicial propriety requires its adoption, as it seems to me, when dealing with the decision of the Secretary in the present instance. This course is peculiarly due to the repose of titles, and the stable maintenance of an established system in a great department; a system that cannot be changed in this respect without much expense, confusion, and delay, in the administration of that department.

3. But suppose the Secretary was mistaken, and the subdivision of fractional section 22 is illegal; what then is *671] the plaintiff's case? His title is a patent; on his legal title he must recover, therefore he *cannot be heard to say his patent is void because founded on an illegal subdivision: the question then is reduced to this; what does the patent cover? Etheridge had no peculiar rights by the act of 1830, save that he had a preference of entry; like others purchasing of the United States he was compelled to buy in legal subdivisions; before 1820 not less than an entire fractional section could be sold; nor after the act of that year, could one be sold in subdivisions until divided, under regulations by the Secretary of the Treasury. Further than this, the act of

1805 remained unchanged, as to fractions. Etheridge could not be permitted to treat a quarter-section in a fraction, although found there, as if it was found in an entire section. He did attempt it, in proving up his preference right, but when he applied to enter at the Land-office the register rejected his claim, and compelled him to take the land on which he resided in the form and quantity it had been laid off according to the instructions; and this he did take. The government is bound by its patent; is estopped to disavow the subdivision granted; and as estoppels are mutual, Etheridge is equally bound, by the grant. It recites the patent certificate; this says it is for ninety-two acres and sixty-seven hundredths, bounded "according to the official plat of the survey of the said lands, returned to the General Land-office by the surveyor-general—which said tract, described in the plat returned, has been purchased by the said James Etheridge." The plat is part of the patent certificate; is referred to in the patent, and is part of that also, just as much as if it was attached to the same paper. By the plats of public surveys, lands must be identified, and the boundaries ascertained, in all cases of the kind. The parties agree of record that exhibit No. 2 is the official map described in the patent of Etheridge; according to this, he purchased lot A for ninety-two acres and sixty-seven hundredths; his eastern boundary being the red line made by the surveyor-general, pursuant to the instructions. This was undoubtedly the land the government intended t sell, and, as I think, as certainly the same Etheridge intended to buy, and did buy; of course he can recover no land east of that line, and therefore the judgment ought to be affirmed, even if the instructions were illegal and void.

4. The case does not stop here: Stone's patent is elder than Etheridge's; the same plat is referred to in each; Stone's is for the one hundred and ten acres and fifty hundredths east of the red line. This is not disputed. To overcome it, Etheridge's patent must be supported by a legal entry for the same land, elder than Stone's patent. As already stated, until Etheridge paid his money, he could have no legal entry from which to date his title. There being no such subdivision existing in law as the south-west quarter of fractional section 22, when Etheridge presented his occupant claim, he could not be permitted to enter in that form, or for that quantity. Such was the express instruction of May 31, 1831, (2 Land Laws *and Instructions, No. 497, and again in No. 521.) [*672 The first subdivision was created afterwards by the act of the surveyor-general, and is indicated by the red line. That it is denominated the south-west quarter in the patent, amounts,

in my judgment, to very little: thus the department saw proper to call such subdivisions; the denomination was arbitrary and not precise, but we cannot discard the substance for the sake of correcting terms of description open to verbal criticism. The land contained in plat referred to in Etheridge's patent, is a technical quarter-section in the language of the General Land-office; and such subdivisions are known by no other name there, as will be seen by No. 483 and No. 486 in the volume of Instructions above referred to. Thus in No. 483, dated July 28th, 1830, the commissioner instructs the register at Mount Salus, that the pre-emption law of that year restricted the quantity to be located to one hundred and sixty acres, or a quarter-section; but that it did not intend that an excess over one hundred and sixty acres, "in a tract of land technically known as a quarter-section," should be cut off so as to restrict the quantity literally to one hundred and sixty acres. "The law, (says he,) having taken it for granted that every quarter-section contains one hundred and sixty acres, which not being the fact, we must be guided by what we know to be the spirit and intention of the law." He then instructs the register, in cases of fractional sections, to conform to the subdivisions as made by the surveyor-general, and to give the quantity as near as practicable.

No. 486 is a general circular, dated September 14, 1830, on the same subject in part. Instruction 8 directs: "Although a quarter-section may be found to contain rather more than the ordinary quantity of one hundred and sixty acres, the right of pre-emption is extended to the full quantity of such quarter-section." In the language, therefore, of the General land-office, the south-west quarter of fractional section 22, called for in Etheridge's patent, is as well known by its designation, as if the section was entire. This the Instruction No. 497 above, explains, where the subdivided quantity is less, to be a "technical" quarter also, as well as if the quantity had been more. But if there be uncertainty, here, as in former cases, we must refer to the plat and quantity to explain the uncertainty. This course was pursued in the case of *McIver* v. *Walker*, 9 Cranch, 173, and again in 4 Wheat., 444. There the plat was held to control the face of the patent, and fixed a different locality, because Crow Creek was laid down on the plat, nearly through its centre; the location certificate copied in the patent, as in this case, called for a beginning, and for courses from that point, running off from the creek, which was not named as being crossed by the lines; yet this court diregarded the calls, and held the land lay on both sides of the creek, as indicated in the naked plat. It was a much

weaker case than the present. In patents of the United States, from their earliest date down to this day, nothing is referred to but numbers *on the public surveys. To hold that the surveys did not explain and control the [*673 patent as to identity, and side lines, would be an abandonment of both; as nothing else can establish either.

Much stress is laid on the fact that the half-mile post is found on the south boundary of section 22. The same line-marks are uniformly made on all sectional lines, regardless of fractions: so it would have been done had the fraction 22 been for less than one hundred and sixty acres, and not subjected to subdivision. The section south may have been entire, and the corner post necessary for the purposes of that section.

Another difficulty stands in the way of the plaintiff's recovery. Stone's patent is the elder; it is admitted it covers the land in dispute—the patent passed the perfect and consummate title; in an action of ejectment the patent is conclusive, as was held by this court in *Wilcox* v. *Jackson*, and *Bagnell* v. *Broderick*, 13 Pet., 516, 450. You can only go behind it, and give it earlier date, from a precise legal entry for the same land made by the grantee, to overreach an elder patent; as this court held in *Ross* v. *Barland*, 1 Pet., 655. We have seen Etheridge did not enter the land in dispute when he paid his money, and took his patent certificate. To overthrow Stone's patent, we must rely on the preference right to enter. At best, it is a remote and doubtful equity; Stone paid for the land, (and if the assumption be true,) has an equity attached to it for his purchase money; presenting a case of conflicting equities, with which a court of law cannot deal. In the language of this court in *Bagnell* v. *Broderick*, "we are bound to presume for the purposes of this action, that all previous legal steps had been taken by Stone to entitle himself to the patent, and that he had the superior right to obtain it, notwithstanding the claim set up by Etheridge; and having obtained the patent, Stone had the best title known to a court of law, to wit, the fee." There a much more imposing equity than Etheridge can pretend to, was set up. In no respect, therefore, is there any ground for reversing the decision of the Supreme Court of Alabama, as is supposed by me.

In the case of *Brown et ux.* v. *Hunt*, Mr. Justice DANIEL dissents from the opinion of the court, and concurs in opinion with Mr. Chief Justice and Mr. Justice CATRON.

*LESSEE OF GEORGE CLYMER ET AL., PLAINTIFF IN ERROR, v. GEORGE DAWKINS ET AL., DEFENDANTS IN ERROR.

A court is not bound to give instructions to the jury in the terms required by either party; it is sufficient if so much thereof are given as are applicable to the evidence before the jury, and the merits of the case as presented by the parties.[1]

The entry and possession of one tenant in common, is ordinarily deemed the entry and possession of all the tenants; and this presumption will prevail in favor of all, until some notorious act of ouster or adverse possession by the party so entering is brought home to the knowledge or notice of the others. When this occurs, the possession is from that period treated as adverse to the other tenants.[2]

Such a notorious ouster or adverse possession may be by any overt act in *pais* of which the other tenants have due notice, or the assertion in any proceeding at law of a several and distinct claim or title. If an attempt be made to obtain a partition, although the legal proceedings by which it is effected may be invalid or defective, still, being a matter of public notoriety, the co-tenant is bound at his peril to take notice of the claim to adverse possession thus set up.[3]

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[1] CITED. *State, to use* v. *Donnelly*, 9 Mo. App., 531.

[2] "The seisin and possession of one tenant in common of real estate is seisin and possession for the use of the others." *Kinney* v. *Slattery*, 51 Iowa, 353; *Burns* v. *Bryne*, 45 Id., 285; *Campbell v. Campbell*, 13 N. H., 483. And such is the presumption of the law. *Day* v. *Howard*, 73 N. C., 1. The one stated in the quotation is the general rule. *Bowen* v. *Preston*, 48 Ind., 367; *Foulke* v. *Bond*, 12 Vr. (N. J.), 527; *Covington* v. *Stewart*, 77 N. C., 148; *Miller* v. *Myers*, 46 Cal., 535; *Challefoux* v. *Ducharme*, 8 Wis., 287; *Mining Co.* v. *Taylor*, 10 Otto, 37; *Humbert* v. *Trinity Church*, 24 Wend. (N. Y.), 587; *Phillips* v. *Gregg*, 10 Watts (Pa.), 158; *Young* v. *De Bruhl*, 11 Rich. (S. C.) L., 638; *Vaughan* v. *Bacon*, 15 Me., 455; *Campan* v. *Campan*, 44 Mich., 31; *Lillianskyoldt* v. *Goss*, 2 Utah T., 292; *Fairclaim* v. *Shockleton*, 5 Burr., 2604; *Ford* v. *Grey*, Salk., 285. The knowledge of one tenant will be attributed to his co-tenant, the same as the knowledge of the agent to the principal. *Ward* v. *Warren*, 82 N. Y., 267; see *Munson* v. *Munson*, 30 Conn., 425. But the admissions of one are not evidence against the other. *Young* v. *Griffith*, 79 N. C., 201; nor does a judgment against one co-tenant in an action for possession bar his co-tenant. *Stovall* v. *Carmichael*, 52 Tex., 383; see *Williams* v. *Sutton*, 43 Cal., 71. The act of one tenant affecting the property is presumed to be for all. *Foulke* v. *Bond*, 12 Vr. (N. J.), 527; *Wood* v. *Phillips*, 43 N. Y., 152; *Baker* v. *Whiting*, 3 Sumn., 475; nor will it be presumed that one tenant designed a wrong to his co-tenant, unless it is clearly proven. *Berthold* v. *Fox*, 13 Minn., 507. So if one tenant acquire possession by stealth or against his co-tenant who had sole possession, it will be deemed lawful. *Wood* v. *Phillips*, supra. Their relation to each other is one of trust. *Harrison* v. *Harrison*, 56 Miss., 174; *Jackson* v. *Tibbits*, 9 Cow. (N. Y.), 241; *Kathon* v. *Rockwell*, 16 Hun (N. Y.), 90; *Doe d. Fisher* v. *Prosser*, Cowp., 217.

[3] FOLLOWED. *Warfield* v. *Lindell*, 30 Mo., 282.

There is no difference between an ouster by a co-tenant and an ouster by a stranger; but in making proof of ouster, it is much more difficult in the former than in the latter case. "Acts of ownership are not, in tenancies in common, necessarily acts of disseisin;" (*Prescott* v. *Nevers*, 4 Mason, 326.) So that this presumption, here indirectly stated, must be overcome. Therefore, it is necessary to prove an actual ouster. *Barmitz* v. *Casey*, 7 Cranch, 456; *Halford* v. *Tetheson*, 2 Jones (N. C.) L., 393; *Jones* v. *Weatherbee*, 4 Strobh. (S. C.) L., 50; *Trapnall* v. *Hill*, 31 Ark.,

If the tenants in possession only claim the undivided interest which was held by their immediate grantors, it is not adverse to the remaining part of the title, and such persons cannot defend themselves in ejectment by giving in evidence an outstanding title elder than that under which they claim; nor can they avail themselves of the Statute of Limitations.

But if the occupants entered into possession and held the lands for more than twenty years before the commencement of the suit, by a purchase and claim thereof in entirety and severalty, and not an undivided part thereof, in co-tenancy, it is an adverse possession, and the Statute of Limitations is a good plea.[4]

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Kentucky.

There were three tenants in common of a tract of land in Kentucky, and the question was, how far the possession of the occupiers, holding under two of the three, constituted an adverse possession against the third, so as to entitle them to the benefit of the Statute of Limitation.

In 1806, a patent was issued by the Governor of Kentucky to George Clymer for one-third, and Charles Lynch and John Blanton for two-thirds of a certain tract or parcel of land, containing eleven thousand acres by survey, bearing date the 30th of May, 1784, lying and being in the county of Jefferson, on the waters of Harrod's creek, and bounded as follows, &c., &c.

A division of the land was made by commissioners and

345; *Edwards* v. *Bishop*, 4 N. Y., 61; *Gilchrist* v. *Ramsay*, 27 U. C. Q. B., 500; *Siglar* v. *Van Riper*, 10 Wend. (N. Y.), 414; *Higbee* v. *Rice*, 5 Mass., 351; *Noble* v. *McFarland*, 51 Ill., 226. A demand by a co-tenant to be admitted to the possession, and a specific refusal, is evidence of an ouster. *Miller* v. *Myers*, 46 Cal., 535; *Green* v. *Tripp*, 56 Id., 209; *Doe d. Hellings* v. *Bird*, 11 East, 49; but not of itself sufficient. *Carpentier* v. *Mendenhall*, 28 Cal., 484; see *Roberts* v. *Moore*, 3 Wall, Jr., 207. But where the defendant in a suit in ejectment denied the plaintiff's title and right of entry, that was deemed good proof of an ouster. *Sigler* v. *Van Riper*, 10 Wend. (N. Y.), 414; see *Green* v. *Tripp*, 56 Cal., 209; *Miller* v. *Myers*, 46 Id., 535. Yet other courts hold that there must be outward acts of exclusive ownership, of an unequivocal character, notorious and overt, such as by their own force impart information and give notice to the co-tenant of an adverse possession and actual disseisin. *Warfield* v. *Lindell*, 38 Mo., 561, 581; *Rust* v. *Rust*, 17 W. Va., 901; *Boggess* v. *Meredith*, 16 Id., 1; *Zeller* v. *Eckert*, *ante*, *289. *Culver* v. *Rhodes*, 87 N. Y., 348.

[4] CITED. *Abernathie* v. *Consolidated Virginia Mining Co.*, 16 Nev., 271.

If the grantee obtain a conveyance of the *entire estate* from one of two or more tenants in common, and makes an entry under such title, his possession is adverse. *Foulke* v. *Bond*, 12 Vr. (N. J.), 527; *Kinney* v. *Slattery*, 51 Iowa, 353; *Horne* v. *Howell*, 46 Ga., 9; *Kittredge* v. *Locks*, 17 Pick. (Mass.), 246; *Clark* v. *Vaughan*, 3 Conn., 191; *Gill* v. *Fauntleroy*, 8 B. Mon. (Ky.), 186; *Long* v. *Stapp*, 49 Mo., 506; *Hinckley* v. *Greene*, 52 Ill., 230; *Prescott* v. *Nevers*, 4 Mason, 326; *Gray* v. *Bates*, 3 Strobh. (S. C.) L., 498; *Doe d. Reed* v. *Taylor*, 5 Barn. & C., 575; so the same rule is applicable to joint tenants. *Larmon* v. *Huey*, 13 B. Mon. (Ky.), 436; *contra* (as to the general statement), *Seaton* v. *Son*, 32 Cal., 481; *Roberts* v. *Morgan*, 30 Vt., 324; *Holley* v. *Hawley*, 39 Id., 532.

offered in evidence during the trial; and as the various proceedings under this commission ran through a long period of time, the whole of them will be stated before passing on to other circumstances in the history of the case.

"Henry county, the first day of January, eighteen hundred and two.

"We, William Neall and Isaac Forbes, having been appointed commissioners by the County Court of the said county *675] of Henry, in *conformity to an act of the General Assembly of the state of Kentucky, for the purpose of making division of lands between residents and non-residents in the said county of Henry, having been called on to divide a tract of eleven thousand acres on the waters of Harrod's creek, in the name of George Clymer for the one-third, and Charles Lynch and John Blanton two-thirds, agreeably to a patent bearing date the 24th day of December, in the year of our Lord, one thousand eight hundred and six, and of the commonwealth of Kentucky the fifteenth, and signed by Christopher Greenup, the then Governor of Kentucky. It being stated to us that the said George Clymer is a non-resident, we have gone on the ground, and made the following division, to wit: Charles Lynch and John Blanton's portion is lot No. 1, containing seven thousand three hundred and thirty-three and one-third acres, agreeably to the plat hereby laid down, which is bounded as followeth, to wit: &c., &c.

"No. 2, on the plat allotted to George Clymer on the division, is bounded as follows, to wit, containing three thousand six hundred and sixty-six and two-thirds acres: Beginning, &c., &c., hereby conveying and affirming the foregoing division, agreeable to the said allotment, to the said Charles Lynch and John Blanton, for the two-thirds of said eleven thousand acres, and the one-third to the said George Clymer, agreeably to the metes and bounds before described.

"Given under our hands and seals as commissioners aforesaid, the day and date first above written.

WILL. NEALE, [L. S.] Com'r.
ISAAC FORBES, [L. S.] Com'r.

"Signed, sealed, and delivered in presence of

Henry County Court, Clerk's Office, Jan. 1, 1810.

"The within division of land was filed in my office, acknowledged by William Neale and Isaac Forbes, commissioners in said county for the division and conveyance of

lands, parties thereto, as their act and deed, and admitted to record.

"Att. ROW. THOMAS, C. C.

"*Henry County, October Court*, 1827.

"An instrument of writing purporting to be a division of eleven thousand acres of land, in the county of Henry, between Charles Lynch, John Blanton, and George Clymer, the same being made by William Neale and Isaac Forbes, commissioners appointed for that purpose, was this day produced into court, (the commissioners being absent,) together with the certificate of acknowledgment, entered and attested by Rowland Thomas, clerk. Whereupon, on motion of Charles H. Allen, attorney for the parties, it is ordered that the same be now received and recorded accordingly, which was heretofore done.

"Att. EDMD. P. THOMAS, C.
By WILL. SHARP, D. C.

"*Henry County Court, Clerk's Office, Aug.* 8, 1828.

"I, Edmund P. Thomas, clerk of the County Court [*676
for the county aforesaid, do certify, that on the day of the date hereof, the foregoing commissioners' report of lands, together with the certificates thereon endorsed, were filed in my office and recorded.

"Att. EDMD. P. THOMAS, C."

In 1813, George Clymer, one of the patentees, residing in Philadelphia, made his will and died. He devised his property to certain persons in trust, for the payment of certain moneys, and these to be divided amongst his children and grandchildren.

Much evidence was given in the court below, to show the nature of the title and possession under which the occupants (residing entirely upon the part allotted to Lynch and Blanton) held their lands. They all claimed under Lynch and Blanton; and the following is a summary of the evidence: It was proved that these persons entered upon and first improved, settled, and occupied, the land; and they, and those claiming under them, have held, claimed, and occupied, the land, as their own, for upwards of twenty-five years before the commencement of this suit; but no evidence was introduced by either of the defendants, conducing to prove that either of them, or any other person, had given any express notice to the patentee, Clymer, in his lifetime, or either of the trustees named in the will of said Clymer, that they, or any of them,

held the land adversely to the claim or right of Clymer; nor was any evidence given, tending to prove that notice of any sort had ever been given to Clymer, or any of the trustees named in his will, by any of the defendants, or any other person under whom any of them claim, except the facts which the evidence did conduce to establish, that the land in possession of each defendant had been taken possession of, improved, and occupied by actual residence, by each defendant, (or at first by him of whom he derived his possession and claim of right, and afterwards by himself,) as all entirely his or their own, and not as co-tenant with Clymer or his devisees, and had been so ever afterwards held, for upwards of twenty years, and up to the commencement of this suit.

It did not appear by the evidence, that either of the defendants, or his predecessor in the possession, had any knowledge or notice, in fact, that Clymer was a co-partner with Lynch and Blanton, or had any interest in the land; and plaintiff's counsel insisted only that they were bound to know and notice the right of Clymer, apparent on the patent.

Evidence was also introduced to show that most of the defendants were within the boundary of adverse patents, elder in date than the patent to Clymer, Lynch and Blanton, and that some of them had contracted with the claimants of those elder patents, for the land in their possession, since they became possessed of it.

The suit was brought in December, 1840, by the representa-
*677] tives *of Clymer, against sixty-three occupants of the tract, which, as before stated, had been assigned, in the partition, to Lynch and Blanton.

Upon the trial, the plaintiff asked the court to instruct the jury:

1. That if the jury believe, from the evidence, that the defendants, or others under whom they claim, entered upon the land in contest under the claim of Clymer, Lynch and Blanton, for eleven thousand acres, that such of the defendants as the jury may find so entered, by themselves or others under whom they claim, cannot avail themselves of the elder patents read in evidence, as to defeat the plaintiff in this action.

2. That the defendants cannot defeat the plaintiff's right to recover, if the jury believe, from the evidence, the plaintiff ever had right, by reason of the Statute of Limitation, provided the jury believe, from the evidence, that the defendants, or those under whom they claim, entered upon the land in contest, under the title of Clymer, Lynch and Blanton, for the eleven thousand acres patented to them.

3. That if the jury find, from the evidence, that any of the defendants entered upon the land in contest, under a parol contract of purchase from the agent of Lynch and Blanton, who were tenants in common with Clymer in the eleven thousand acre patent, read in evidence; and the jury also find that such of the defendants as so purchased never notified the patentee Clymer, or the trustees named in his will and codicil, or either of them, that they held adversely to Clymer's title, that the defendants, as to whom the jury may so find, cannot avail themselves of the Statute of Limitation in defence of this action. Also,

4. That such defendants as the jury may find as above-mentioned, if there be any such, cannot avail themselves of the outstanding conflicting elder patents read in evidence, unless the jury further find that such defendants, in the opinion of the jury, have proved a connection with such elder patent or patents, by purchase, either made by them or others under whom they claim.

The court refused to give either instruction, as asked, but instead thereof gave to the jury the following instruction:

"The court instruct the jury, that if they find, from the evidence, that any of the defendants, or those under whom they claimed, entered upon the parcel of the land in controversy in their possession at the commencement of this action, under a contract, whether it was executed or executory, by parol or in writing, with the agent of Lynch and Blanton, or either of their co-grantees with Clymer, of the eleven thousand acres, by the patent read by plaintiff, or any other person claiming under that patent, whereby they purchased an individual two-thirds, or any other such part, and not the entire interest in such parcel or parcels of the land, then such defendants, or those under whom they claimed, and who had so entered, did not, by their entry into the possession, oust Clymer or his devisees of his *or their undivided third [*678
thereof; but the entry of such purchasers and their possession was for him, Clymer, or his devisees, as well as for themselves; and in the absence of all evidence of notice to Clymer, or those claiming under him, of a subsequent adversary holding by such occupants, their possession did not become adversary, in legal effect, to Clymer or his devisees; and no defendant, who so entered, can now avail himself of the outstanding legal title by the elder patents to be read in evidence; nor can any such defendant prevail in his defence of this action by the length of his possession, and the Statute of Limitation; nor can any defendant who entered, claiming

the entire estate in his parcel of the land, add to the length of his own possession that of any one under whom he claimed and had succeeded, who had so entered under a purchase of an undivided part, and was so a co-tenant with Clymer or his devisees, and thereby make out the twenty years of adversary possession within the statute."

The defendants moved the following instructions, to find as in case of a nonsuit as to all the defendants:

That the plaintiff has shown title only to an undivided interest in the land, and that only one-fifteenth.

To find in favor of all the defendants whose tenements fall within the elder claims of Tuttle and Howard.

To find in favor of all whose possession existed, and continued, and have been held as their own, for twenty years before the commencement of this suit.

To find in favor of those whose possession existed and continued under Lynch and Blanton, and adverse to Clymer, for twenty years before suit brought.

To find in favor of those whose possession originated, and have been held as their own, twenty years before suit brought, under purchases from Lynch and Blanton, or either of them, after the division made under the orders of the Henry county court.

The court refused to give either of the instructions, as moved by the defendants, but in substitution therefor gave the following instructions:

"The court instruct the jury, that their verdict ought to be for each defendant who, or whose predecessor in possession, from whom he had derived his possession and claim of right, had entered on the land in his possession at the commencement of the action, twenty years before that day, by a purchase and claim thereof in severalty, all as his own, and not an undivided part in co-tenancy with Clymer or his devisees, but adversely to him or them, whether such purchase was from Lynch or Taylor, or Lynch and Blanton, or any other who had ever afterwards, up to the commencement of this suit, continued thus to hold such possession."

To each opinion and decision of the court, in refusing to *679] give the instructions as moved by the plaintiff and each of them, and in giving *the instructions which were given by the court in substitution, or instead thereof, the plaintiff at the time excepted. Also, the plaintiff excepted to the instruction which is given by the court in substitution of the instructions moved by the defendants, at the time the instruction was given, and he now excepts to each opinion and

decision, and prays that this his bill of exceptions be signed, sealed, and enrolled, which is accordingly done.

THOS. B. MONROE, [L. S.]

Crittenden, for the plaintiff in error.

Tibbatts and *Armstrong*, (in a printed argument,) for the defendants in error.

Crittenden made the following points:

1. That the proceedings of the County Court of Henry county, and of the commissioners for the purpose of making a partition of said land, were not authorized by any law, and the division was therefore null and void, because not conformable to the statutes on which its validity depended. 1 Littell's Laws of Kentucky, 691; *Hood* v. *Mathers*, 2 Marsh. (Ky.), 559; 3 Litt. (Ky.), 40; *Clay* v. *Short*, 1 Marsh. (Ky.), 371.

2. That the defendants having entered and held under the patent to Clymer, Lynch, and Blanton, could not lawfully set up and rely for their defence upon any other outstanding adverse patents to bar the plaintiff's recovery, and especially as it was not shown to be a subsisting and available title.

3. That the possession of the defendants having been acquired under Lynch and Blanton, or one of them, could not be considered as adverse to their co-tenant, Clymer, or allowed to operate as a bar to the present action; and that this is especially true as to those defendants who showed no deed or written evidence of purchase.

1st. Eight years after the division was said to have been made, it was given to the clerk, and not to the court until 1827. The act of Assembly does not say when it must be recorded, but twenty-five years is too long a time to elapse. The parties might have had it in their pocket all this time. The courts in Kentucky have always construed such papers strictly. See the authorities above.

2d. If the defendant has acknowledged the title of the plaintiff, he cannot afterwards dispute it. 1 Cai. (N. Y.), 394, 444; 5 Cow. (N. Y.), 129, *et seq.* 174; 4 Cranch, 419.

Nor can a defendant, whose predecessors had recognized the title of the plaintiff, afterwards dispute it. 5 Cow. (N. Y.), 129, 130; 4 Johns. (N. Y.), 230; 1 Caines (N. Y.), 394; 4 Munf. (Va.), 478; 2 Johns. (N. Y.), Cas., 353; 3 Pet., 50; 3 Serg. & R. (Pa.), 386; 13 Johns. (N. Y.), 116; 3 Mart. (La.), (N. S.), 11; 6 Johns. (N. Y.) 34; 7 Id., 157; 19 Id., 202; 5 Cow. (N. Y.), 520; 3 Wash. C. C., 498.

The defendants also offered in evidence outstanding titles in

*strangers, which they alleged to be elder and better than the plaintiff's title. Can they do this?

If it be admitted as the settled doctrine, that though the plaintiff in ejectment has a title better than that of the defendant, yet that he is not entitled to recover if the defendant can show a superior title in a third person, though he does not claim any privity with that third person: If this be the admitted doctrine, it is subject to a great many exceptions, which destroy its general applicability, and those exceptions are supposed to include the present case. The instances of such exceptions are numerous, namely:

A mortgagor is never suffered to set up the title of a third person against his mortgagee. *Doe* v. *Pegge*, 1 T. R., 758, *n.*

It is established that a mortgagor cannot set up a prior mortgage to defeat the recovery of a second mortgage. He is barred by his own act from averring that he had nothing in the premises at the time of the second mortgage. The principle of this decision has been repeatedly recognized. *Lade* v. *Holford*, 3 Burr., 1416; *Newhall* v. *Wright*, 8 Mass., 138, 153; *Jackson* v. *Dubois*, 4 Johns. (N. Y.), 216.

A lessee cannot do it against his lessor; 8 Mass., 138, 153; 1 Cai. (N. Y.), 444; 2 Id., 215; 7 Johns. (N. Y.), 186; but it is needless to cite authorities on this point.

So a person who has entered into possession under another, and acknowledged his title, cannot set up an outstanding title in another. *Jackson* v. *Stewart*, 6 Johns. (N. Y.), 34; *Jackson* v. *De Walts*, 7 Id., 157; *Jackson* v. *Henman*, 10 Id., 292.

Nor can a person claiming the land under a tenant, set up an outstanding title against the landlord. *Jackson* v. *Graham*, 3 Cai. (N. Y.), 188.

A person who has entered by permission under one tenant in common, cannot, after partition made, set up an adverse title against another tenant in common, to whose share the premises had fallen. *Smith* v. *Burtis*, 9 Johns. (N. Y.), 174; *Fisher* v. *Creel*, 13 Id., 116.

A mere intruder cannot protect himself by setting up an outstanding title. *Jackson* v. *Harder*, 4 Johns. (N. Y.), 202.

But if a defendant have acknowledged the title of the plaintiff, he cannot afterwards dispute it. *Jackson ex dem. Low* v. *Reynolds*, 1 Cai. (N. Y.), 444; *Jackson ex dem. Smith et al.* v. *Stewart*, 6 Johns. (N. Y.), 34; *Jackson ex dem. Davy* v. *De Walts*, 7 Id., 157; *Jackson ex dem. Browne* v. *Henman*, 19 Id., 202.

And even where the predecessors of the defendant had acknowledged the title of the claimant, it was held that the defendant was equally precluded from setting up the defence

of adverse possession. *Jackson ex dem. Van Schaick and others* v. *Davis*, 5 Cow. (N. Y.), 129, 130.

*Where one takes by descent as a co-heir and tenant in common, he cannot show (in ejectment by his co-heir, or one claiming under him) that the ancestor had no title. *Jackson ex dem. Hill* v. *Streeter*, 5 Cow. (N. Y.), 520. [*681

Armstrong, for defendants in error, stated the case and proceeded thus:

The issue, then, in this cause between the parties seems to be on the question: did the entry of defendants on land to which plaintiff had right in common with their vendor, notwithstanding their ignorance of that right, their want of intention to enter as tenants in common, and their express entry claiming and holding the land as their sole freehold, adversely to the whole world, constitute them tenants in common with Clymer?

It is not, I presume, necessary for me to cite authority to show the intention with which an entry is made on land defines the nature of that entry. These defendants, and those under whom they claim, entered under their purchases as sole owners in fee of the whole lands held by them, and were so possessed thereof for more than twenty-five years before the commencement of this suit.

The counsel for defendants does not deem it necessary to consume the time of the court, by using argument, or citing authority, to prove that possession of land by a purchaser, under a contract for the entire estate, without right in the grantor, is adverse to the rightful owner; or that a person in possession of land may purchase in an outstanding title to protect that possession, but will merely call the attention of the court to the case of *Jackson ex dem. Preston, &c.* v. *Smith*, in the Supreme Court of New York, 18 Johns. (N. Y.), 406, as a case in point. There the defendant held under a deed made by one out of nine tenants in common; but the deed purported to be for the whole fee. The court says, (page 411,) "the deed," under which defendant held, "for the whole lot cannot control the possession of the defendant, and of his father, so as to make it the entry and possession of a tenant in common, merely because it gave title to no more than one-ninth part of the whole lot;" and again, (page 112,) "it is evident, therefore, that the doctrine in relation to tenants in common does not apply to this case. It might as well be urged as applicable to a conveyance made by a stranger of any lands held in common, and it will not be questioned that the purchaser under such a deed, given without right on

the part of the grantor, would notwithstanding be adverse to the rightful owners, although held by them in common."

It is believed the case cited presents the true law of this case, and should the court deem it necessary, they are respectfully requested to examine the case referred to for themselves.

Tibbatts, for the defendants in error, recited the facts and evidence in the case with great particularity, and then added:

*682] *Under this state of the evidence, on the part of the defendants, we contend that the law of the case was for them, and the verdict of the jury correct on the following grounds:

1. Because the division was a good and valid division, and severed the estate of Clymer from that of his co-patentees.

2. Because, if it were not good in its inception, it became good by the lapse of time, and the legal presumptions arising from the lapse of time.

3. Because the defendants held the land adversely to the right or title of the lessor of the plaintiff, and their holding being adverse, his right of entry is barred by the Statute of Limitations.

By the act of the legislature of Kentucky, approved December 19, 1792, (2 M. & B., 1066,) it is enacted, sect. 1, that if the owners of lands within this state, who are non-residents, do not attend to have the same divided, where the same is held in conjunction with citizens of this commonwealth, or with other non-residents, where such non-residents may apply by themselves or agents to have the same divided, or do not appoint agents to make such division within one year from the passage hereof, the courts of the several counties within this state shall appoint six commissioners in each county, who, or any two of them, shall, when called upon for the purpose by the citizens of this commonwealth, or the owners of lands who are non-residents, or their agents, attend and make such division agreeable to the contract entered into by the parties, "and such commissioners shall make return of such land by them so divided, with the quantity and names of the parties concerned, and by whom called upon to do the business, to the county court of the county where such land may lie, to be there recorded."

The requisitions of this act are,

1. The appointment of six commissioners by the court, which has been done.

2. The return of the land, with the quantity and names of the parties concerned, and by whom called on, &c., which is construed to mean "a description of the boundaries of the

whole tract, and of the particular lots divided, together with the names of each party holding interests, so that it may duly appear who were parties to the partition;" *Hood* v. *Mather*, 2 Marsh (Ky.), 560; which has been complied with.

3. That the return shall be made to the county court of the county; and it is decided (Id.) that it will not be good to make the return to the clerk's office, but that it must be made to the county court.

We contend that this condition has also been complied with; for though the division was first returned to the clerk's office and acknowledged by the commissioners, yet it was afterwards presented to the court, which was good, because the statute does not require that the commissioners shall present it in person, nor acknowledge it; it being an official act, such as the return of a summons by a sheriff, [*683 *which, with the papers with the return written thereon, may be handed in person, or sent by a third person, or by letter, &c.

Nor does the statute fix any time in which the division is to be returned; nor is there any thing to be done by the commissioners in court, or by the court itself, the law itself ordering what is to be done. Besides, it appears from the record of the court, that it was received and ordered to be recorded, on the motion of "the agent of the parties," which will include Clymer as well as the other, and will be so intended by the court. See *Pringle* v. *Sturgeon*, Litt. (Ky.), Sel. Cas., 112, and *Parker's heirs* v. *Anderson*, 5 Mon. (Ky.), 540. That if the division was not good in its inception, it became good by the lapse of time, and the jury had a right to presume every thing which would be necessary to make it good, as a deed of release, or confirmation from Clymer.

"Artificial or legal presumption is arbitrary, inflexible, and conclusive. It is the policy of the law substituted for proof of facts, the establishment of which by oral testimony, or written testimony, or written memorial, is rendered impossible by lapse of time."

The presumption not absolutely conclusive is such, that after twenty years a bond is paid off; a mortgage satisfied, the mortgagor remaining all the time in possession; the equity of redemption released, the mortgagee having enjoyed the possession twenty years; or the legal title conveyed to the purchaser after twenty years' possession, &c., &c. These may all be combatted by proofs or explanations, inconsistent with the inference of reason, and from the isolated facts which of themselves would establish the presumption. Hence their consideration belongs to the jury, to whom they will be left

upon hypothetical instructions. The jury may presume a deed when neither the chancellor nor the common law judge will or can. Stark., 1216, 1227, 1235; Peake Ch., 25.

A possession of thirty years or less, by a purchaser who held a bond for a title, would be sufficient, in the absence of any controlling circumstances, to create a legal presumption of a conveyance from the possessor of the legal title. In such a case, it is not only necessary for peace and justice, that such a presumption should arise, but is intrinsically probable that a deed was made. 10 Johns. (N. Y.), 377; 11 Id., 456; 3 Mass., 399; 5 Cranch, 262; *Gaines* v. *Conn's heirs*, 2 J. J. Marsh. (Ky.), 107.

Although the Statute of Limitations will not run where the possession held is on pledge, mortgage, &c., yet, "if possession had been of twenty years' duration, it might have justified the presumption, in case there were no repelling circumstances, that the testator relinquished the title to the slaves in satisfaction of the debts, and a court of chancery would not then interfere to disturb the possession. *Mims* v. *Mims*, 3 J. J. Marsh. (Ky.), 106.

Without some opposing probability, the jury will presume
*684] a deed after possession of twenty years, by one who had purchased the *land, which, in consequence of his purchase, he shall have so long occupied. 2 Saund., 175 a.; Stark., 502, 1243, 989; 7 Wheat., 59.

Grants may be presumed from lapse of time. 12 Co., 5; 2 Hen. & M. (Va.), 370.

Generally whatever will toll the right of entry will create a presumption of the conveyance of the legal title.

Every thing necessary to the validity of a collector's deed will be presumed after twenty years, if it be shown that he was collector of taxes which were committed to him. 14 Mass., 145; Id., 177; *Fitzhugh* v. *Croghan*, 2 J. J. Marsh. (Ky.), 436.

8. But we contend further, that the defendants held the land adversely to the right or title of the lessor of the plaintiff, and that their holding being adverse, the right of entry is tolled, and the plaintiff is barred by the Statute of Limitations.

We admit, as a general principle, that the possession of one tenant in common, or joint-tenant, is the possession of the other; *Coleman* v. *Hutchinson*, 3 Bibb. (Ky.), 209; and that the Statute of Limitations does not run against one tenant in common in favor of another, unless there has been an actual ouster and adverse holding. (Id.) But in this case we contend that there has been both; we show that the defendants,

ignorant of the rights of the ancestor of the lessor of the plaintiff, without any intention to enter as tenants in common, entered upon the land, expressly claiming and holding it as their sole freehold, adversely to the whole world; they, and those under whom they claim, entered under their purchases, as sole owners in fee of the whole land held by them, and were so possessed for more than twenty-five years before the commencement of the suit.

The *quo animo* with which an entry is made on land, will define the nature and character, whether friendly or adverse, and extent of the possession acquired by the entry; 1 Marsh. (Ky.), 347; *Calk* v. *Lynn's heirs*, 3 Id., 615; and whether the possession of land is adverse to a certain claim or not, is a question of fact to be found by the jury; *Bowles* v. *Sharp*, 4 Bibb. (Ky.), 550; or as the true doctrine is more distinctly laid down in *Barrett and wife* v. *French*, 1 Conn. The possession of one tenant in common recognizing the title of his co-tenants, is in legal consideration the possession of all; that persons under the same title, without partition, cannot prescribe against each other. *Broussard* v. *Duhamel*, 3 Mart. (La.) N. S., 11.

That where "two persons claim by the same title, there shall be no adverse possession, so as to toll the entry of the one, but an entry of the other be at all times lawful. 2 Esp. N. P., 8, (old paging 434;) *Carothers et al.* v. *The Lessee of Dunning et al.*, 3 Serg. & R. (Pa.), 386.

But that a person claims to hold land under the same title, is no evidence that he holds amicably with the original holder of that title, or those claiming under him. The purchaser of land sold for the non-payment of taxes holds adversely to the former owner, and *can consequently avail himself of [*685
twenty years' adverse possession. *Graves* v. *Hayden*, 2 Litt. (Ky.), 65. The court say, "The circumstance that the defendant claims to hold the land in controversy under Martin's title, was no evidence of his not holding adversely, nor could it prevent the Statute of Limitations from running. Being a purchaser in fee, though he held under Martin's title, he did not hold under Martin, but in his own right, in virtue of his purchase, and must therefore have continued to hold adversely to Martin and those deriving title through him."

So a purchaser under a sheriff's sale—and

Where a party had obtained a decree, though a void one, for a conveyance in fee absolute, and a conveyance in pursuance thereof of the inheritance of his deceased wife, under the erroneous idea that he was heir of her son, who died shortly after his mother's death, and had sold the land to one

who retained the possession twenty years, such alienee is protected in his title and possession by lapse of time. *Baseman's heirs* v. *Batterton et al.*, 1 Dana (Ky.), 432.

So with the defendants, notwithstanding they claim the same title, and though the division may have been void.

Therefore, though the possession of one tenant in common should be deemed the possession also of his co-tenant, nothing to the contrary appearing; yet if a tenant in common enter not as a tenant in common, but adversely to his co-tenant, his twenty years' possession would not only be a good defence against, but would in fact so invest him with the complete title, as to enable him to recover in ejectment against his co-tenant.

"That one tenant in common may oust his co-tenant, and hold in severalty, is not to be questioned. But a silent possession, accompanied with no act which can amount to an ouster, or give notice to his co-tenant that his possession is adverse, ought not, we think, to be construed into an adverse possession." *McClung* v. *Ross*, 5 Wheat., 124, per Marsh. Ch. J.

The law is, that nothing but an actual ouster by one tenant in common shall give him the exclusive possession. *Lessee of Empsom* v. *Shackleton*, 5 Burr., 2604; *Carothers et al.* v. *The Lessee of Dunning et al.*, 3 Serg. & R. (Pa.), 385.

But if there has been an actual ouster and adverse holding, it is well settled in numerous cases, that the Statute of Limitations will run from the time of such ouster and adverse possession. *Coleman* v. *Hutchinson*, 3 Bibb. (Ky.), 212; and see *Brackett* v. *Norcross*, 1 Greenl. (Me.), 91; *Russell's Lessee* v. *Baker*, 1 Harr. & J. (Md.), 71; *Lessee of Brandt et al.* v. *Whitbeck*, 6 Cow. (N. Y.), 633; *Van Dyck* v. *Van Buren*, 1 Cai. (N. Y.), 84; *Bryans* v. *Atwater*, 5 Day (Conn.), 188.

We contend that the division of the land, the marking the lines, the selling the entire fee, amounted to an actual ouster —no actual force was necessary, and none could have been used in this case, the *land being wild land. To prove *686] an actual ouster by one tenant in common against another, it is not necessary to show that any real force was used; it is sufficient to show that the tenant in possession claims the whole, and denies the title of his co-tenant; *McConnell* v. *Brown*, Litt. (Ky.) Sel. Cas., 468; Adams Eject., 56; and this rule must work both ways.

Where the defendant, having purchased a lot of land, and received a deed for the whole lot, in which the grantor stated himself to be the heir of the patentee, and he entered into the possession under that deed, and it afterwards appeared that

the grantor had title to one-ninth part of the lot only, as a tenant in common, this was held not to alter the character of the defendant's possession, so as to prevent its being adverse, but that he must be deemed to have entered under his deed, as sole owner of the fee in the whole lot; and that possession of land by a purchaser under a deed for the entire lot, given without right in the grantor, is adverse to the rightful owners, though tenants in common with the grantor. *Lessee of Preston et al.* v. *Smith*, 13 Johns. (N. Y.), 406.

And in the case of *Culler et al.* v. *Motzer*, 13 Serg. & R. (Pa.), 356, it is held, that if one tenant in common sell the whole tract, and possession be held adversely for twenty-one years, the sale and possession amount to an ouster of the co-tenant, who is bound by the act of limitations.

This case is fully in point: the court say, "the possession here was for twenty-five years, in denial of the right of the other; for the sale of the whole, and the possession under such sale, would amount to an ouster." The purchaser, who came into possession in 1800, came into possession under a title adverse. Motzer could never be considered as a co-tenant, and as the bailiff and receiver of James Brown, and as such accountable for the profits in an action for account rendered. He never entered as a tenant in common; and the charge of the court was altogether correct, for this was an entire tract of land to which there was no adverse claim, and therefore the adverse claim was co-extensive with the claim. That was the only right, and the possession there being no adverse title, was according to that right. There ought not, consequently, to be made any deduction on account of James's supposed outstanding title. *Jackson ex dem. Preston* v. *Smith*, 13 Johns. (N. Y.) Possession of land by a purchaser, under a deed of an entire lot, is adverse to the rightful owner, though tenant in common with the grantor.

If, then, a tenant in common or joint-tenant cannot hold adversely to his co-tenant, and if the holding of the defendants amounts, as we contend it does, to an ouster in contemplation of law, and they do hold adversely to the claim of Clymer, the lessor of the plaintiff, then they can rightfully rely either upon the Statute of Limitations, or an outstanding elder title, according as their circumstances may require either defence; and there is no error in the proceedings of the Circuit *Court, either in refusing to grant the instructions asked for by the counsel for the plaintiff, or in giving [*687 the substituted instruction for the defendants, or in substituting the instruction for those asked for by the plaintiff.

Mr. Justice STORY delivered the opinion of the court.

This is the case of a writ of error to the Circuit Court of the district of Kentucky. The original suit was an ejectment for a certain tract of land, in Kentucky, containing eleven thousand acres: and upon the trial, upon the general issue, a verdict was found for the defendants, upon which judgment passed for them. A bill of exceptions was taken by the plaintiff, to the opinions of the court at the trial; and to revise those opinions, the present writ of error is brought by the plaintiff.

On the 24th of December, 1806, a patent for the tract of eleven thousand acres of land was granted by the commonwealth of Kentucky, unto George Clymer, (under whose will the lessors of the plaintiff make claim,) one-third, and unto Charles Lynch and John Blanton, (under whom the defendants make claim,) two-thirds. In the year 1810, if not at an earlier period, (for there is some repugnancy in the various dates stated in the record,) Lynch and Blanton procured a partition of the tract to be made, by the authority of the County Court of Henry, by certain commissioners appointed pursuant to the Kentucky statute of 1792, by which one-third was assigned in severalty to Clymer, (he being then a non-resident,) by certain metes and bounds; and the remaining two-thirds were assigned to Lynch and Blanton, by certain other metes and bounds. The return of the commissioners was filed, acknowledged, and admitted to record in the clerk's office of the county of Henry, in 1810; but the court of that county do not seem to have ordered the return to be received and recorded until 1827. How this delay took place, has not been satisfactorily explained; and the omission has been insisted upon as an objection to the validity of the partition.

All the defendants appear, from the evidence, to have derived title to the lands in their respective occupation, and to have entered into possession of the same, after the partition was made, and by titles in severalty, derived exclusively from or under Lynch and Blanton; and the lands held by them are situate exclusively within the tract assigned by the partition to Lynch and Blanton. The main defence relied upon by the defendants, at the trial, was an adverse possession to the title of Clymer, during the period prescribed by the Statute of Limitations of Kentucky. To rebut this defence, the plaintiff insisted that the partition was void, and being void, the defendants having entered into the land under the patent to Clymer, Lynch and Blanton, who still, notwithstanding the partition, in point of law, remained tenants in common of the land, were not at liberty to set up an adverse possession against

that title; nor at liberty to set up *any outstanding superior title in any third person, under any elder patent offered in evidence, to defeat the plaintiff in the action.

The plaintiff, upon the evidence, (which need not be here particularly recited,) moved the court to instruct the jury as follows: [See the statement of the reporter.]

The defendants also moved the court to give certain instructions to the jury; which instructions the court refused to give, but gave the following instruction in substitution thereof: [See statement.]

To the instructions so refused as propounded by the plaintiff, and to the several instructions so given by the court, the plaintiff excepted; and the cause stands before us for consideration upon the validity of these exceptions.

The first point made at the argument for the plaintiff, is as to the validity of the partition under the proceedings in the county of Henry. In our judgment, it is wholly unnecessary to decide whether those proceedings were absolutely void or not; for, assuming them to have been defective or invalid, still, as they were matter of public notoriety, of which Clymer was bound, at his peril, to take notice; and as Lynch and Blanton, under those proceedings, claimed an exclusive title to the land assigned to them, adversely to Clymer; if the defendants entered under that exclusive title, the possession must be deemed adverse, in point of law, to that of Clymer.

And this leads us to the consideration of the instructions actually given by the court, which cover the whole ground in controversy, and, if correct in point of law, show that the court rightly refused to give the instructions asked by the plaintiff, so far as they were not consistent with the instructions actually given. It is very clear that the court are not bound to give instructions in the terms required by either party; but it is sufficient if so much thereof are given as are applicable to the evidence before the jury, and the merits of the case, as presented by the parties.

The first instruction given by the court is as favorable to the plaintiff, in all its bearings, as the law either justifies or requires, and is in direct response to the substance of some of the instructions asked by the plaintiff. It in substance states that if the defendants entered under the title of Clymer, Lynch and Blanton, as tenants in common, and did not claim any title except to two thirds of the parcels of land respectively held by them, and not to the entirety thereof, then their entry into the possession did not oust either Clymer or his devisees of his or their undivided third part, and was not adverse thereto; and that the defendants so entering could

not avail themselves of the defence of the Statute of Limitations; and they could not avail themselves of the outstanding legal title of third persons by any elder patent. So far as this instruction goes, it is manifest that it was favorable to the plaintiff; and indeed it is not now *per se* objected to, but the objection is, that it does not go far enough, and thus was to the prejudice of the plaintiff.

*689] *The real point in controversy turns upon the second instruction given by the court, in answer to the prayer of the defendants. That instruction, in substance, states, that if any of the defendants entered into possession of the lands respectively claimed by them, and held the same for more than twenty years before the commencement of the suit, by a purchase and claim thereof in entirety and severalty, and not for an undivided part thereof, in co-tenancy with Clymer or his devisees, but adversely to them, then such defendant was entitled to a verdict in his favor, whether he held by a purchase from Lynch, or Blanton, or any other person who had ever afterwards, up to the commencement of the suit, continued thus to hold the possession. We see no objection to this instruction, which ought to prevail in favor of the plaintiff; on the contrary, we deem it entirely correct, and consonant to the principles of law upon this subject. It is true, that the entry and possession of one tenant in common of and into the land held in common, is ordinarily deemed the entry and possession of all the tenants; and this presumption will prevail in favor of all, until some notorious act of ouster or adverse possession by the party so entering into possession, is brought home to the knowledge or notice of the others. When this occurs, the possession is from that period treated as adverse to the other tenants, and it will afterwards be as operative against them, as if the party had entered under an adverse title. Now such a notorious ouster or adverse possession may be by any overt act *in pais*, of which the other tenants have due notice, or by the assertion, in any proceeding at law, of a several and distinct claim or title to an entirety of the whole land, or, as in the present case, of a several and distinct title to the entirety of the whole of the tenant's purparty under a partition, which, in contemplation of law, is known to the other tenants. Upon so familiar a doctrine it scarcely seems necessary to cite any authorities. So early as *Townsend* and *Pastor's* case, 4 Leon., 52, it was holden in the Common Pleas, by all the justices, that where there are two co-parceners of a manor, if one enters and makes a feoffment in fee of the whole manor, this feoffment not only passes the moiety of such co-parcener, which she

might lawfully part with, but also the other moiety of the other co-parcener, by disseisin. This decision was fully confirmed and acted on, in the recent case of *Doe d.* of *Reed* v. *Taylor*, 5 Barn. & Ad., 575, where the true distinction was stated, that although the general rule is, that where several persons have a right, and one of them enters generally, it shall be an entry for all; for the entry generally shall always be taken according to right; yet that any overt act or conveyance, by which the party entering or conveying asserted a title to the entirety, would amount to a disseisin of the other parties, whether joint-tenants, or tenants in common, or parceners. Upon the same ground, it was held in New York, in the case of *Jackson* v. *Smith*, 13 Johns. (N. Y.), 406, that a conveyance made by one tenant in common, of the entire *fee of the land, and an entry and possession by [*690 the purchaser, under that deed, is an adverse possession to all the other tenants in common. To the same effect is the case of *Bigelow* v. *Jones*, 10 Pick. (Mass.), 161. The reason of both these latter cases is precisely the same as in the case of a feoffment, the notoriety of the entry and possession, under an adverse title, to the entirety of the land.

Similar principles have been repeatedly recognized in this court. In *McClung* v. *Ross*, 5 Wheat., 116, 124, the court said, "That one tenant in common may oust another, and hold in severalty, is not to be questioned. But a silent possession, accompanied with no act which can amount to an ouster, or give notice to his co-tenant, that his possession is adverse, ought not, we think, to be construed into an adverse possession." In the case of the *Lessee of Clarke* v. *Courtney*, 5 Pet., 319, 354, this court also held, that where a person enters into land under a deed or title, his possession (in the absence of all other qualifying or controlling circumstances) is construed to be co-extensive with his deed or title; and although the deed or title may turn out to be defective or void, yet the true owner will be deemed disseised to the extent of the boundaries of such deed or title. This doctrine is strongly applicable to the possession under the partition in the present case. There are several other cases affirming the same doctrine, and especially *Green* v. *Liter*, 8 Cranch, 229, 230; *Barr* v. *Gratz*, 4 Wheat., 213, 223; and *The Society for Propagating the Gospel* v. *The Town of Pawlet*, 4 Pet., 480, 504, 506. The doctrine has been carried by this court one step farther; but at the same time one which is entirely consistent with the principles on which the general rule, and the exceptions to it, are founded. In *Blight's Lessee* v. *Rochester*, 7 Wheat., 535, 549–550, it was held, that in cases of vendor and purchaser,

although the latter claimed his title under or through the former, yet as between themselves, the possession of the purchaser under the sale, where it was absolute and unconditional, was adverse to that of the vendor, and he might protect that possession by the purchase of any other title, or by insisting upon the invalidity of the title of the vendor, as the foundation of any suit against him. Now, upon this last ground, the defendants were certainly at full liberty as absolute purchasers in fee to maintain their adverse possession to the land, and the bar of the Statute of Limitations against Lynch and Blanton, and *à fortiori* against Clymer.

Upon the whole, we are entirely satisfied that the second instruction given by the court was correct in point of law; and, therefore, the judgment of the Circuit Court ought to be affirmed with costs.

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*691] *ROBERT BROCKETT ET AL., APPELLANTS *v.* WILLIAM BROCKETT ET AL., DEFENDANTS.

When an issue is directed by a court of chancery, to be tried by a court of law, and in the course of the trial at law, questions are raised and bills of exceptions taken, these questions must be brought to the notice and decision of the court of chancery which sends the issue.

If this is not done, the objections cannot be taken in an appellate court of chancery.[1]

If the chancery court below refers matters of account to a master, his report cannot be objected to in the appellate court, unless exceptions to it have been filed in the court below in the manner pointed out in the seventy-third chancery rule of this court.[2]

THIS was an appeal from the Circuit Court of the United States for the District of Columbia, in and for the county of Alexandria.

The case is sufficiently stated in the opinion of the court.

Neale and *Bradley*, for the appellants.
Jones and *Brent*, for the appellees.

Mr. Justice McLEAN delivered the opinion of the court.

This is a bill in chancery, brought here by an appeal from the Circuit Court of the District of Columbia.

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[1] FOLLOWED. *Watt* v. *Starke*, 11 Otto, 253. CITED. *McLaughlin* v. *Bank of Potomac*, 7 How., 227; *Garsed* v. *Beall*, 2 Otto 695; *Johnson* v. *Harmon*, 4 Id., 379.

[2] APPLIED. *West* v. *Smith*, 8 How., 410. CITED. *Mt. Pleasant* v. *Beckwith*, 10 Otto, 527.

The complainants filed their bill, alleging themselves to be the legitimate heirs of Robert Brockett, deceased, and claiming as such one-half of the real and personal property of which he died seized and possessed. The defendants filed their answers, denying the allegations of the bill. An issue at law was directed to try the legitimacy of the complainants, and after hearing the evidence, the jury found a verdict in their favor.

Several exceptions were taken to the rulings of the court, in the admission of evidence to the jury, and to the refusal of the court to admit evidence offered by the defendants, which appear in two bills of exceptions. And these decisions, in relation to the trial of the issue, constitute the principal ground of controversy in the case.

It does not appear that any questions were raised on the chancery side of the court, growing out of these exceptions. And this not having been done, it is proper to inquire whether the exceptions can be considered in this court.

It is contended that as the same judges sat in the court of law as in the court of chancery, that it could not be necessary to bring before them as chancellors what they had decided in a court of law. Had the court of law been held by different persons from those who sat as chancellors, it is admitted that it would have been necessary to bring before the latter the points ruled in the trial of the issue. But is not the principle the same in both cases? The capacities in which the same tribunal acts on such occasions, are as distinct as if the same duties had been performed by different tribunals. [*692 *The distinction is the same as where a judgment at law is entered by a court which also exercises chancery powers; and which powers are invoked against its own judgment. In such a case it might as well be said, as in the present one, why may not the same court, whether acting at law or in chancery, having possession of the cause, finally decide it.

The bills of exceptions are copied into the record; but they do not properly constitute a part of it, as they were not brought to the notice and decision of the court sitting in chancery. An issue in part is directed by a court of chancery to inform its conscience. To bring the fact or facts before the jury at law, a feigned issue is made by pleadings, as at law; and if the pleadings of the jury be unsatisfactory to the court of chancery, either on account of the admission of incompetent evidence, the exclusion of evidence which is competent, or by a mistake of the facts by the jury, the court of chancery will order another trial of the issue. By the consent of parties these issues are sometimes tried without the

formality of pleading. But in all cases where objections exist to the verdict, they must be brought before the court of chancery which orders the issue. And where this is not done in an inferior court, the objections cannot be taken in the appellate court of chancery. It is a general rule of practice, that no point arising on the pleadings or evidence in an appellate court shall be made which was not brought to the notice of the inferior court. And we think in this case, that the exceptions taken on the trial of the issue at law not having been acted on by the court of chancery below, cannot be insisted on in this court.

Being satisfied of the legitimacy and consequent heirship of the complainants, from the verdict of the jury, the court below referred to a master the rents received by the defendants, and other matters of account pertaining to the estate. And to some of the items allowed by the master, objections are made before this court. But it does not appear that these objections were brought before the lower court by exceptions to the master's report. The seventy-third chancery rule is decisive on this subject. It provides that "the parties shall have one month from the time of filing the master's report, to file exceptions thereto, and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule-day after the month is expired." No exceptions having been filed in the Circuit Court to the report of the master, none can be heard in this court.

The verdict and the report of the master, which constituted the basis of the decree of the court below, not having been objected to in that court, cannot be objected to here, and consequently the decree of the Circuit Court is affirmed with costs.

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*693] *JOHN MCDONOGH, PLAINTIFF IN ERROR, v. LAURENT MILLAUDON AND OTHERS, DEFENDANTS.

The treaty by which Louisiana was ceded to the United States recognised complete grants, issued anterior to the cession, and a decision of a state court against the validity of a title set up under such a grant, would be subject to revisal by this court under the 25th section of the Judiciary Act.

But if the state court only applies the local laws of the state to the construction of the grant, it is not a decision against its validity, and this court has no jurisdiction.[1]

Congress, in acting upon complete grants, recognised them as they stood; and the act of 11th May, 1820, confirming such as were recommended for con-

[1] IN POINT. *Kennedy* v. *Hunt*, 7 How., 594; *Doe* v. *Eslava*, 9 Id., 450.

firmation by the register and receiver, had no reference to any particular surveys.

A decision of a state court, therefore, which may be in opposition to one of these surveys, is not against the validity of a title existing under an act of Congress, and this court has no jurisdiction in such a case.[2]

Where a cause has been pending in this court for two terms, a writ of certiorari sent down at the instance of the defendant in error, to complete the record, and the defendant in error then moves to dismiss the case upon the ground that the clerk of a state court issued the writ of error, and one of the judges of that court signed the citation, the motion comes too late.[3]

THIS case was brought up by writ of error, under the 25th section of the Judiciary Act, from the Supreme Court of the state of Louisiana.

The decision of this court being against its jurisdiction, it seems best to give the opinion of the Supreme Court of Louisiana, as the facts in the case and the points decided by that court are stated with great clearness.

"Supreme Court of the state of Louisiana.

"The court met, Monday, April 26th, 1841.

"Present, their honors Henry A. Bullard, A. Morphy, E. Simon, and Rice Garland. His honor Judge Martin is absent on account of indisposition.

"Laurent Millaudon et al., appellees, v. John McDonogh, appellant. } Appeal from the District Court for the First Judicial District.

"The plaintiffs (Millaudon and others, who were plaintiffs in the original action) allege that they, with Henry T. Williams and Charles F. Zimpel, purchased a large tract of land of A. F. Rightor, being a portion of a claim or grant generally known as the Houmas, in the parish of Ascension. They took possession with the intention of dividing it into smaller tracts and selling them at auction, to effect a partition; but were prevented from doing so by the acts and conduct of the defendant, who publicly declared that he was the owner of a large portion of the land, and slandered their title. They say they have requested him to desist his slanders, or to bring suit to assert his title, which he declines. They pray that he be compelled to set forth his title, if he has any, and if he fail to do so, *that they be quieted in their possession against his claims and pretensions; that he be enjoined and ordered to desist therefrom; and, further, that they have judgment for fifty thousand dollars damages for the tortious acts of the said defendant. [*694

[2] FURTHER DECISION. *United States v. Roselius*, 15 How., 31. FOLLOWED. *Moreland v. Page*, 20 Id., 523; *Lanfiar v. Hunley*, 4 Wall., 210. See *Habich v. Folger*, 20 Wall., 7, 8.

[3] FOLLOWED. *Buckingham v. McLean*, 13 How., 151.

"The defendant pleads a general denial; then specially that the plaintiffs have no title; he further avers he is the true and lawful owner of the land by good and sufficient titles, and concludes by a demand in reconvention, in which he prays the plaintiffs may be cited to answer; that they be compelled to produce and exhibit their titles, and that he be quieted and maintained in his possession of the land.

"The plaintiffs, for answer to this reconvention demand, plead the general issue, and called on A. F. Rightor, as their warrantor, to maintain and defend their title against that of McDonogh. Rightor answers the call in warranty by a plea of the general issue; secondly, that the plaintiffs are not entitled to the remedies against him, which they claim; thirdly, that they had a perfect knowledge of the character and extent of the defendant's claim when they purchased, and, therefore, have no right to call on him as warrantor. He further says, the plaintiffs have a good and sufficient title; that McDonogh has none at all; and if he has, he is bound to sue the plaintiffs to establish it, or abandon his claim. He prays that McDonogh be compelled to exhibit his title; that it be rejected; and he concurs in the prayer of the plaintiffs against him, (McDonogh.)

"It is further prayed that the cause be tried by a jury; but, subsequently, the parties agreed to submit the question of titles to the court, reserving the damages to a trial before the jury.

"The issues in this case are somewhat complicated; it has been argued at great length and with eminent ability. A variety of questions have been raised by bills of exceptions, which, with the evidence, have swelled the record to a great size; and both plaintiffs and defendant evidently desire the court to go much farther into an investigation of, and decision upon, their respective titles, than is necessary for the settlement of the controversy between them. We think we can see difficulties enough likely to arise out of both these claims, in which persons not now before us may be interested. We shall not anticipate the points that may hereafter be made, and will now only decide what is indispensable to the adjustment of the difficulty between the parties before us.

"The first question is, upon which party lies the burden of proof as to the title of the land. The defendant says, it rests upon his adversaries and their warrantor. We think differently. The reasons given by the district judge, in his judgment, have not been refuted, and are, in our opinion, unanswerable. He says, the demand of the plaintiffs in their original petition does not constitute a petitory action. It is

destitute of the first requisite of that action, not being brought against a party alleged to be in possession. [*695 Code *of Pract., art. 43. On the contrary, the plaintiffs allege they were in possession, and are disquieted and prevented from making a legitimate use and profit out of their possession and title, by the words and acts of the defendant; for which cause they ask for damages, and that he be enjoined from setting up any claim for the future, unless he do it at once, either in the present action or by another suit. It is true, the defendant says he is in possession also; and had he rested his case upon that allegation, it is possible the question would have been limited to that inquiry, according to art. 49 of the Code of Practice. But the defendant has gone further; without excepting to the form of the action, he comes up to the mark, sets up title in himself, and institutes a reconventional demand, asking that the property be adjudged to him. This reconventional or cross action, which is by the Code of Practice consolidated with the principal or original suit, is clearly petitory, and imposes on McDonogh the obligation of making the proof requisite to sustain his demand. So fully does this seem to have been understood by the parties originally, that all the subsequent proceedings are in accordance with the idea of the original defendant having become *pro hâc vice* the plaintiff. The plaintiffs cite their vendor, Rightor, in warranty to defend their title, according to Code of Practice, article 379, *et sequitur*. Every provision of that code assumes that the warrantor is a defendant in the issue.

"There are various decisions of this court, and we hold it well settled, that the last warrantor is the real defendant in a suit against his vendees—not only against the party who cites him, but more particularly against the original actor. That person in the present suit, so far as Rightor is concerned, both in substance and form, is McDonogh, whose pretensions he is called upon by his vendees to resist. This question has been heretofore decided by this court, in 9 Mart. (La.), 556, and 11 La., 188; and we see no reason for changing the precedents.

"McDonogh, holding the affirmative of the issue, offered in evidence a certified copy from the register or record of complete grants in the Land-office in New Orleans, by which it appeared that on the 3d of April, 1769, the French governor of Louisiana granted to Pierre Joseph Delille Dupard, père, a tract of land having thirty arpens front on the Mississippi river, with all the depth which might be found to Lake Maurepas, of the land where formerly stood two villages of the Colapissa Indians, situated about sixteen leagues above the city, on the same side; to take from the plantation of a person

named —— Allemand, and join that of a free mulatto named Joseph Lacomb. The usual stipulations and reservations are made in this grant. To its reception in evidence various objections were made, which were overruled, and bills of exceptions taken by Rightor, and the grant attached after it was received as being a nullity on various grounds. It is not necessary in the present case to decide any of these questions.

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"The counsel for Rightor, on whom devolved the whole defence of this case, (the plaintiffs not appearing at all, further than to join issue with McDonogh,) insists that, supposing the grant to Delille Dupard to be genuine, given by competent authority, and all the rights of the grantee vested in his opponent, (all of which he specially denies, however,) that then this action cannot be maintained; because, he says, it being for a certain front and depth, and it not being specified that the lines are to open or close in any manner, it must be located by parallel lines; and the evidence shows conclusively that, if so located, it will not touch any portion of the land claimed by the plaintiffs. But the counsel for McDonogh insist, the lines should open upwards of twenty degrees, and endeavor to prove that it has been located, and should so continue, as to let the lower line touch the western shore of Lake Maurepas, and the upper running westerly strike the Amite river at a distance of about nineteen miles from the Mississippi, and nearly that distance from the point where the lower line touches the lake. Nothing is said in the grant about the Amite river, nor is it shown that the lines should open in this manner, so as to include the sites of the two Indian villages mentioned in it. If this location were to be sanctioned, the Dupard claim would cover somewhere about one hundred thousand arpens of land.

"To sustain their position, the counsel for McDonogh insist strenuously on what they call a plat made by Don Carlos Trudeau, in 1790, which they say indicates the partition of the tract among the heirs and legal representatives of Delille Dupard, as on it it is said the lines open in the rear as claimed. This document was objected to as evidence by the counsel of Rightor, but received by the court, with the exception of a written memorandum upon it, and a bill of exception taken, which we consider it unnecessary to decide on, as we think the paper does not prove what is alleged, nor is it entitled to any weight as evidence. It is neither a survey, or plat, or a copy properly authenticated, showing how the partition was made. On the face, it is apparent a partition had been made previously, and there is evidence in the record

showing it must have been made several years previous, as one of the heirs sold her portion to Fonteneau, in 1784. This plan is evidently nothing more than a sketch made by Trudeau to represent the front of the tract, which it seems had increased from thirty arpens front, in 1769, to upwards of forty arpens, in 1790. There is not about it that particularity and neatness which marks the operations of the former surveyor-general of the province of Louisiana. The lines drawn seem to be experimental or provisional. None of those running out from the river have any length marked, and out of fifteen lines drawn or dotted, but six have any bearing indicated, and that is different on each of *them. The statement in writing, on the face of the sketch, indicates its true character. It is not in the form of a procès verbal, but is stated to be a note which says that the land belonging to the succession having been asserted to have thirty-five arpens front, according to the declarations of the parties interested, and conformably to the writing and sales passed by the heirs in favor of Henry Fonteneau, Gelar Pedro Le Bourgeois, Alexandre Lange, mulatto, and Don Francisco Dupard, the son, the only one who had not sold his portion; but from the verification that was had in the month of March, 1787, repeated this day, the 10th of August, in the current year, the same was found to contain forty arpens and twenty-three toises front, on the Mississippi, measured upon the lines marked (*punteas*) a, b, c, &c., &c. This is dated the 10th of August 1790, and signed by Carlos Trudean. In no part of this note or statement does he assume any official character. If this plan or sketch was of any validity at all, it would perhaps prove more for the defendant than he wishes, as it fixes this claim in the parish of St. John the Baptist, instead of the county of Acadia. In connection with this plan, we find another in the record, which is authentic, that differs from it in various particulars. It appears that Henri Fonteneau, in 1784, purchased of Madame Macnamora, one of the heirs of Delille Dupard, her portion of the land, being one-fifth. In the act of sale made, in presence of the commandant of the port or parish of St. John the Baptist, the land is described as a tract in that parish, having seven arpens front on the river. by the ordinary depth, (*profondeur ordinaire.*) Not a word is said about the lines extending to the lake, or their opening. On the 24th of September, in the year 1790, Trudeau makes a survey of this land, places it in the parish aforesaid, gives it a front of eight arpens, four toises, and three feet, front, and states the lower side line to run north eight degrees and fifty minutes east, and the upper, north ten minutes west, accord- [*697

ing to the needle, without attending to the variation. *Norte ocho grados cinquenta minutas este de la actual aguja sin attendes a la variacion.* This varies widely from other plans and surveys submitted to us; it in fact differs from any other plat that we see in the record, and it is the only authentic one of the lower portion of the Dupard claim made by authority of the Spanish government. We have no other evidence of any well founded claim to an opening towards the rear, until McDonogh and Brown became interested in the land. They purchased upwards of eighteen arpens front, by eighty in depth, of Pierre Le Bourgeois, the 3d of March, 1806; and in the act of sale there is nothing said of the lines extending beyond that depth, or opening in any manner; but it is mentioned that two plats of survey exist, and were delivered by the vendor to the purchasers, paraphed by the notary, neither of which are produced.

"When the inventory of Delille Dupard's estate was made in 1776, the land is represented as extending to Lake Maure-
*698] pas, but not a *word said of there being an opening towards the rear. Some time after McDonogh and Brown purchased of Le Bourgeois, they presented the claim for confirmation to the commissioners of the United States, in the eastern district of Louisiana, and represented it as having a front of eighteen arpens, three toises, and three feet, front, by eighty arpens deep, and having an opening of twenty degrees and seventy-one minutes towards the rear; and with the exception of a small portion, it was confirmed to that extent. 2 Am. State Papers, Public Lands, 332. This claim was based upon a grant of the Spanish government to Le Bourgeois, nothing being said about a grant to Dupard.

"Another portion of this claim was derived from Dupard, through L. H. Guerlain, agent of the Eastern Shore of Maryland Louisiana Company. We have carefully examined this branch of the title, and find nothing to prove the claim had any opening, until some time after it was recognized by the United States. In 2 American State Papers, relating to public lands, p. 297, this claim was presented for confirmation, and described as 'situate on the east side of the Mississippi river, in the county of Acadia, containing ten arpens and seven toises in front, and a depth extending to Lake Maurepas, bounded on one side by McDonogh and Brown, and on the other by land of Antoine Tregle.' Not a word is said about an opening. The claim is confirmed for a depth of forty arpens, and rejected for the remainder. On pages 300 and 343 of the same volume, it will be seen these claims were again under the consideration of the commissioners, and re-

jected. An examination of the title of the remaining portion of this claim, which comes through Tregle, establishes the fact that the idea of the Dupard grant opening towards the rear was of modern origin. It is certain that McDonogh did not consider it as extending to the Amite river previous to 1806, as he was himself established on that stream some years previous, under a different title, or as a trespasser.

"We have been thus particular in the examination of all these circumstances, to show that the effects of the subsequent action on the claim are not such as contended for by the defendant.

"In 3 American State Papers, relating to the public lands, p. 254, and from the record, we ascertain that McDonogh & Co. again applied to the register of the Land-office and receiver of public moneys in New Orleans, to report on this claim, under the provisions of the act of Congress, passed the 27th January, 1813, entitled 'An act giving further time for registering claims to land in the eastern and western district of the territory of Orleans, now state of Louisiana.' It is described as 'a tract of land situated in the county of Acadia, on the east shore of the Mississippi, sixteen leagues above New Orleans, containing thirty-two arpens front, with a depth extending as far as Lake Maurepas. This tract has formerly been claimed before the board of commissioners, and the depth extending * beyond forty acres rejected by them for want of evidence of title; but the claimants have since produced a complete French title for the whole quantity claimed, in favor of Delille Dupard, under whom they claim, dated the 8d of April, 1769.' His claim is placed by the register and receiver in the first class; which, they say, comprehends such claims as stand confirmed by law. It will be observed that the grant to Delille Dupard is now spoken of for the first time; his claim, whenever mentioned previously, was described as one derived from the Collapissa Indians, yet no mention is made in this report of its having any opening in the rear. That difficulty is met by the defendant by the production of a paper which, he says, is a survey and plat of his claim made by F. V. Potier, a United States surveyor, which it is certified was offered as part of the evidence in support of the claim, when last presented for the action of the United States commissioners; and it is alleged that as the claim was confirmed, it must necessarily be so to the extent mentioned in the plat, it being a portion of the evidence. Admitting for a moment that this plat is valid, we are not prepared to say that the proposition is true to the extent stated. One piece of evidence does not fix the extent and character [*699

of a decision, but we must look to all that is offered, and the amount demanded. There is nothing in what is said by the register and receiver, which authorizes a belief that any operating was claimed, or any was intended to be confirmed. McDonogh & Co. simply say they claim a 'front of thirty-two arpens, with a depth extending as far as Lake Maurepas,' under a complete title to Dupard, and the commissioners say it is a claim that stands confirmed by law.

"The omission to mention any thing about the plat, goes to show it was not regarded, or had but little weight, and we can scarcely suppose that so important an opening, as is claimed, would have been passed over in silence, if it had been seriously pressed.

"We are of opinion, that the plat, even if admissible as evidence, is not entitled to any weight as establishing the extent of the claim. Although Potier says he is a sworn surveyor, commissioned by the surveyor-general of the United States, we know of no right that gives him to run out claims under the direction of individuals merely, and fix the boundaries of those not recognized by the government. It is not pretended he acted under any authority from his superior in making what is called a survey; it never was presented to the surveyor-general for his approval, nor does it seem to have had the legal sanction of any one authorized to act in the premises. Potier does not pretend it is a regular survey; he calls it '*plan extrait des minutes de nos opérations d'arpentage faite dans les années* 1806, 1808, *et* 1812, *lesquelles lignes en divers tems ont été parcourues jusqu'à la rivière Amite et demarqué conformément aux lignes du plan.*' He then goes on to say, Delille Dupard had described his title from the *700] Collapissa Indians, and sold it to various *persons. He does not seem even to have heard of a grant from the French government in 1769, or attempted a location in conformity to it.

"The defendant further states that his claim has been located by the United States since its confirmation, and surveyed in the manner claimed by him. To establish this, he offered in evidence copies of three township plats, to wit: township No 10 south, ranges five and six east, and township No. 11 south, range 5 east. To the introduction of these plats as evidence Rightor objected, because the papers are not, nor do they purport to be, copies of the original plats of those townships, and for other causes mentioned in his bill of exceptions. The district judge admitted them in evidence, in which we think he erred. The papers are copies of copies, and it is a well settled rule of evidence that they are not admissible as

testimony when better evidence can be procured. It is further apparent, from the certificate of the register of the Land-office, that they are not correct copies. The claim of McDonogh is represented on these copies in a manner differing from that in which it appears on the plats in the register's office. The register states on one of the plats, that on the original 'section No. 1 is not colored,' but that he had 'represented it as it now appears, at the request of John McDonogh, Esq.' The coloring of these maps was, perhaps, not intended to deceive or impose on any person, but when it is recollected that surveyors represent private claims properly located on their plats in a coloring different from public lands or doubtful rights, such a representation is calculated to make an erroneous impression. But the objection most fatal to the reception of these plats as evidence, is that they are certified by a person not the keeper of the original. The surveyor-general of the United States for this state is the officer who has charge of the public surveys, and he is the proper person to certify the township maps. 2 Land Laws, 294, sect. 6. The copies of public surveys deposited in the office of the register of the Land-office are placed there for his government, and to enable him to perform the duties imposed by law, but he has not legal authority to certify copies so as to make them legal evidence. The law intrusts that power to another person.

"Although we are of opinion these plats were improperly received in evidence, we have examined them with a view to see if the pretended survey would justify the claim of the defendant. We do not find in the record the slightest evidence of authority from any officer of the United States to locate this claim in any manner. The acts of Congress of the 12th of April, 1814, and the 3d of March, 1831, direct the mode of locating private claims. 1 Land Laws, 652, sects. 3, 4; 2 Land Laws, 294, sect. 6.

"There are also other acts of Congress in relation to the location *of particular classes of claims, but the [*701 defendant does not come within the provisions of any of them.

"It has been decided that the court and jury will look beyond the confirmation of a claim by the land commissioners or Congress, emanating from the former governments of Louisiana, in order to ascertain the extent and boundaries of the land claimed. 11 La., 587. We have acted on that principle in this case, and see no reason to depart from our previous decision, that when the expressions in a title only convey a certain front and depth, the grantee or purchaser cannot claim by diverging lines to the rear, and thereby obtain more than the superfices contained in a parallelogram, unless there be

something in the grant to authorize the opening, or, from the peculiar position of the claim, it shall be necessary to give the superficial quantity. That does not appear necessary in the case before us.

"We repeat, that it is not our purpose to decide in any manner upon the validity of the Humas' grant, under which the plaintiffs claim, nor do we decide any thing more in relation to that alleged to be in favor of Delille Dupard, under which the defendant claims, than to say, whether it is for thirty or forty arpens front, and is eighty arpens or more in depth, it must be located by parallel lines, unless the confirmation to McDonogh and Brown for eighteen arpens, three toises, and three feet, front, by eighty in depth, should for that quantity authorize the opening mentioned in the report on the claim, but it cannot extend beyond it.

"It is clear from the evidence before us, that the claim of the defendant, if located in the manner specified, cannot in any way interfere with the land claimed by the plaintiffs as shown by the plats laid before us.

"The judgment of the District Court is therefore affirmed, with costs."

To review this opinion, under the 26th section of the Judiciary Act, a writ of error was sued out, by which the case was brought up to this court.

Jones and *Meredith*, for the plaintiff in error.
Coxe and *William Cost Johnson*, for the defendants in error.

A motion had been previously made and argued on the part of the defendant in error, to dismiss the case upon three grounds.

1. That the writ of error had been irregularly issued.
2. That no jurisdiction was shown by the record to exist under the 25th section of the Judiciary Act.
3. That the judgment of the court below was not final.

The writ of error was issued by A. Cuvillier, Clerk of Supreme Court of Louisiana, eastern district.

*702] *Coxe*, in support of the motion to dismiss, referred to 2 Dallas, *401, and said that in consequence of this decision, an act of Congress was passed in May, 1792, (1 Story, 260.) In 8 Wheat., 312, 324, it was held that the 9th section of the act of 1792 applied to bringing up cases from the Circuit Courts of the United States, and also from the highest tribunal of a state, when this court can take jurisdiction under the 25th section. 4 Dall., 22; 9 Pet., 602; *McCollum* v.

Eager, 2 How.; 7 Wheat., 164; 12 Id., 117; 2 Pet., 380; 8 Id., 392; 10 Id., 368; 9 Id., 224; 7 Id., 41; 11 Id., 167.

Meredith, in reply, said that there was a difference which must be borne in mind, between the English system and ours. In England the writ was an original writ, issuing out of the court of chancery, which had a double nature. It was a certiorari to remove the record, and a commission to the superior court to affirm or reverse the judgment. 2 Saund., 100, (1.)

Under our judiciary system, it is nothing more than a certiorari to remove the record. It imparts no authority to this court. It gives no jurisdiction. The President of the United States, in whose name the writ issues here, has no power to confer jurisdiction upon this court, as the king has in England, in whose name the writ issues there. Here it is given solely by the Constitution and laws. It is a mere instrument in aid of the revising and appellate power, but is not indispensable. Its sole purpose is to bring the record into court; and if the record is in court, or a copy properly certified and brought there by the party aggrieved by the judgment, with due notice to the other party, there can be no difficulty in proceeding to exercise the appellate power. In order to show that if a copy of the record be in possession of the court, the mode of its removal will not be inquired into, it may be mentioned that a large portion of the cases brought here under the 25th section, are brought without writs of error, viz., chancery cases and admiralty decrees, which are brought simply by a prayer of appeal with citation; and yet the 25th section requires a writ of error in all cases, decrees as well as judgments. In *Martin* v. *Hunter*, the state court refused to make return to the writ, and the plaintiff in error procured an exemplification of the record and brought it himself into this court. 1 Wheat., 349; 6 Id., 264.

If a writ of error is a mere mode of removing the record, and if the mode of removal is form and not substance; if it gives no jurisdiction to the court, but is a mere instrument to facilitate the exercise of the appellate power, then we contend that any defect in the writ itself, or any irregularity in issuing it, is immaterial.

1. It may be waived. The general rule is, that irregularities and defects in the process or pleadings may be waived.

A writ issued with an illegal teste, may be waived. 2 Pick. (Mass.), 592, and the cases referred to in p. 595.

*21 Id., 585. The action was against a deputy sheriff. The writ was served by a coroner; service bad, but cured by appearance. [*708

1 Metc. (Mass.), 508. A motion to dismiss the action, or quash the writ, if not founded on matter of exceptions, which show want of jurisdiction of the court, comes too late after pleading to the action.

In this case the facts show a waiver. The record was filed 24th October, 1842. There was an appearance. This is the third term the case has been here. There was a motion for certiorari at last term. All which make a strong case of implied waiver.

2. If not waived, the defect is cured by the 32d section of the act of 1789. 1 Paine, 486.

But we contend that the writ was regularly issued. The record shows a petition signed by the counsel of the plaintiff in error, and addressed to the Supreme court of Louisiana, assigning reasons why a writ of error would lie, and praying that it may be allowed. Upon which, that court issued the following order:

"Let the writ of error be allowed according to law. The petitioner to give bond and security in the sum of five hundred dollars.

(Signed) "F. X. MARTIN."

From these proceedings it is manifest that the state judge thought he had authority to issue the writ. See dictum of Johnson, J., 1 Wheat., 379.

There is nothing prohibitory in the section. It says "upon a writ of error," but does not say when or how it is to be issued. The provision respecting a citation shows that it was the design of the law to promote the convenience of suitors. To allow the suitor to apply to a state judge for a citation, and yet compel him to go to the Circuit Court for the writ, would conduce nothing to his convenience.

It may be said that our construction would lead to the anomaly of a court issuing a mandatory writ to itself. But, in fact, this is no anomaly in our legislation. By the act of 1792, sect. 11, (1 Story, 260,) the writ of error is directed to be issued out of the Circuit Court, under its seal, returnable to this court.

2d. The judgment is said not to be final. (Mr. *Meredith's* argument upon this point is omitted.)

3d. As to the jurisdiction of this court. A classification of the cases in which jurisdiction is conferred, is made in 10 Pet., 398; 16 Id., 285.

What appears then from the record, and the decision of the court?

It is apparent that McDonogh relied upon the confirmation

of his title, by the report of the register and receiver, and the act of Congress.

The district judge decided that his claim was not embraced by the act; that there had been no confirmation.

If the writ of error had been taken to this judgment, there could have been no doubt of the jurisdiction.

*A construction of the act was directly drawn in question; and the decision was against the right and title specially set up and claimed by McDonogh, under the act. [*704

The writ of error, however, is to the judgment of the Supreme Court.

It is apparent that in that court also, McDonogh relied upon the confirmation of his title, by the act of Congress.

What title?

A title to the whole extent of his claim, as established by the evidence of a survey before the register and receiver, and by them so confirmed.

Whatever they reported was confirmed by the act. And in the absence of all evidence of a prior title out of the United States, the report and confirmation were conclusive. *Strother* v. *Lucas*, 12 Pet., 410; *Grignon* v. *Astor*, 2 How., 319; *Boatner* v. *Walker*, 11 La., 582. But the Supreme Court decided, that assuming the confirmation of the act of Congress, it was a confirmation of the bare title, without any ascertainment of location. And that although no title was shown by Rightor, they had a right to look beyond the confirmation, and ascertain the extent and boundaries of the claim.

Now here again, the construction of the act of Congress was drawn in question: for McDonogh relied on it as a confirmation of his title for the whole quantity of land, claimed before the register and receiver.

But the court gave a different construction of the act; and therefore decide against the right and title specially set up under it by McDonogh.

It is a case then clearly within the 25th section.

Mr. Justice CATRON delivered the opinion of the court.

The question in the Supreme Court of Louisiana was one of boundary. The court passed on the grant to Dupard only, and not on the opposing claim: if the lines of the former did not open in their production from the Mississippi, towards Lake Maurepas, then the land claimed under Millaudon's title was not embraced by Dupard's grant, and no necessity existed for the examination of Millaudon's. Dupard's was made in 1769, "for thirty arpens of front to the river Mississippi, upon the whole depth that shall be found, unto Lake Maurepas, of

the land where heretofore were two villages of the Collapissa savages; to take from the plantation of one Allemand, unto its junction with that of a person named Joseph Lacombe." The front being ascertained, the court below held that the extension back must be on parallel lines. As this construction excluded the land claimed by Millaudon, it ended the controversy in his favor.

Did this final judgment draw in question the construction of a treaty or statute of the United States; or of an authority *705] exercised *under the same; and was the decision against the validity of either; or against the title, or right set up or claimed under either? If these questions are answered in the negative, it follows we have no jurisdiction to re-examine, or reverse the judgment under the 25th section of the Judiciary Act; as no other error is within the cognisance of this court.[1]

1. The treaty with France, of 1803, gave no further sanction to the boundary of McDonogh's title than it had by the grant; in respect to its validity, the decision of the state court supported the claim to the same extent that the treaty protected it, and therefore the decision was not opposed to the

[1] In an action of ejectment between two citizens of Maryland, for a tract of land in Maryland, where the defendant set up an outstanding title in a British subject, which he contended was protected by the treaty, and, therefore, the title was out of the plaintiff, and the highest court in Maryland decided against the title thus set up, it was held not a case in which a writ could lie to the Supreme Court of the United States. It was not "a case arising under a treaty." *Owings* v. *Norwood*, 5 Cranch, 344. But a writ of error was held to lie to the highest state court where the question was whether a confiscation under a state law was completed before the treaty of peace with Great Britain. *Smith* v. *Maryland*, 6 Cranch, 286. The appellate jurisdiction of the Supreme Court of the United States extends to a final judgment or decree in any suit in the highest court of law or equity of a state, where is drawn in question the validity of a treaty. *Martin* v. *Hunter*, 1 Wheat., 304. But this must appear from the record, and not from a report of the judge trying the case at *nisi prius* which is not a part of the record. *Inglee* v. *Coolidge*, 2 Wheat., 363; *Miller* v. *Nicholls*, 4 Id., 311; *Cohens* v. *Virginia*, 6 Id., 264. The treaty need not be spread of record, but the record must show a complete title under the treaty, and that the judgment of the court is in violation of that treaty. *Hickie* v. *Starke*, 1 Pet., 94; *Willson* v. *Marsh Co.*, 2 Id., 245; *Weston* v. *Charleston*, 2 Id., 449; *Harris* v. *Dennie*, 3 Id., 292. An indictment and prosecution drawing in question a treaty with the Cherokee nation of Indians is within the appellate jurisdiction of the United States. *Worcester* v. *Georgia*, 6 Pet., 515. The merits of the case cannot be examined on such an appeal, but only whether the decision violates the treaty. *New Orleans* v. *Armor*, 9 Pet., 224. No other error can be assigned. *Crowell* v. *Randell*, 10 Id., 368. A false allegation in the record that the treaty has been misconstrued will not give the Supreme Court jurisdiction. *Choteau* v. *Marguerite*, 12 Pet., 507. It must appear that a construction of the treaty actually arose, not that it might have risen. *Ocean Ins. Co.* v. *Polleys*, 13 Id., 157; *Coons* v. *Gallagher*, 15 Id., 18; *Armstrong* v. *Treasurer of Athens Co.*, 16 Pet., 281; *Mills* v. *Brown*, 16 Id., 525.

treaty. A question partly involving this consideration was adjudged in *The City of New Orleans* v. *De Armas*, 9 Pet., 225, to which we refer.

2. Was the decision of the Supreme Court of Louisiana opposed to any act of Congress? Dupard's grant was completed as early as 1769, and presented to the register and receiver as a complete title; was thus reported on by them to the General Land-office, and by that department the report was laid before Congress; it is as follows:

"No. 406.

"John McDonogh & Company claim a tract of land situated in the county of Acadia, on the east shore of the river Mississippi, sixteen leagues above New Orleans, containing thirty-two arpens front, with a depth extending as far as lake Maurepas.

"This tract of land has formerly been claimed before the board of commissioners, and, the depth extending beyond forty acres, rejected by them, for want of evidence of title; but the claimant has since produced a complete French title to the whole quantity claimed, in favor of Pierre Delille Dupard, (under whom he claims,) dated 3d day of April, 1769."

On the report at large, embracing many claims, Congress proceeded; and by the act of May 11th, 1820, declared "that the claims to lands within the eastern district of Louisiana, described by the register and receiver of said district in their report to the commissioner of the General Land-office, bearing date the 20th day of November, 1816, and recommended in said report for confirmation, be, and the same are hereby confirmed, against any claim on part of the United States."

McDonogh's claim, No. 406, is of class first, species first, in the report, including twenty-one grants, of which the register and receiver say: "All the preceding claims, being founded on complete titles, are in our opinion confirmed by law." 3 Am. State Papers, 255. This is explained in page 267, where it is again said: "Those claims which are found under species first of the first class, being founded on complete grants of former governments, we think are good in themselves on [*706 general principles, and therefore require no *confirmation by the government of the United States to give them validity."

Many incomplete titles were recommended for confirmation, and confirmed by Congress, but in these cases the former governments had not parted with the ultimate interest in the land, and the fee was transferred to the United States by the

treaty, with the equity attached in the claimant, which equity was clothed with the fee by the confirming act. The perfect title of McDonogh being clothed with the highest sanction, and in full property, on the change of governments an assumption to confirm it would have been pregnant with suspicion that it required confirmation by this government, in addition to the general law of nations and the treaty of 1803, which secured in full property such titles. That the grant stands recognized as complete and valid, against the United States, and any one claiming under them, by the proceedings had before the register and receiver and by Congress, we have no doubt; further than this, the government has not acted on it. In such sense similar titles have been treated, as will be seen by the two acts of May 8th, 1822—the first confirming lots in the town of Mobile and claims in West Florida; the second, sanctioning the reports of the registers and receivers of the land-offices at St. Helena Court House and at Jackson Court House, in the district east and west of Pearl river; in regard to which reports, Congress says: That all complete titles (reported on as such) be, and the same are, recognized as valid and complete against the United States, or any right derived under them.

But in McDonogh's case, as in other similar ones referred to above, the recognition extended only to the boundaries the grants themselves furnished, according to their landmarks, and true construction under the local laws in virtue of which they were obtained.

3. To overcome this objection, it is insisted, on the part of the plaintiff in error, that McDonogh & Company filed plans of survey and descriptions of the land with the register and receiver, and especially that of F. V. Potier, as part of their title, giving the boundaries as they were claimed before the Supreme Court of Louisiana; that these were confirmed by Congress; that the confirmation, to the extent it was made, is binding on the United States, as the opposing claim of Millaudon was not drawn in controversy below, and the lands claimed treated as unappropriated, by individuals.

If the fact assumed was true, that the plans and descriptions had been confirmed, and boundary given to the title according to them by the United States, then the decision would be opposed to the confirmation, and jurisdiction exist in this court.

There can be no doubt such plans and descriptions were filed and recorded in due time, but no evidence is found in the record that the register and receiver acted on them, or that they were presented to Congress even as documents accom-

panying the report; if they were, it is manifest that they were disregarded, for two reasons: *first, because Congress did not assume the power to deal directly with this title at all; and, secondly, because the report had reference singly to the face of the grant, regardless of private surveys made subsequent to its date, at the instance of the successive owners.

The state court held McDonogh's title to be valid to every extent that it has been recognized by the United States, and only applied the local laws of Louisiana in its construction, so far as they had a controlling influence on the manner in which the side lines should be extended from the Mississippi river towards Lake Maurepas; and as, in so doing, neither the treaty of 1803, nor any act of Congress, or authority exercised under the United States, was drawn in question, this court has no jurisdiction to revise the decision of that court; for which reason, the cause must be dismissed.

The clerk of the Supreme Court of Louisiana issued the writ of error, and one of the judges of that court signed the citation; and, on the ground that such writ could not remove the record, it was moved on a former day of the term to dismiss the cause. It has been here for two terms; a writ of certiorari has been sent down, at the instance of the defendant in error, in whose behalf the motion is made, to complete the record; he now moves to dismiss for the first time, and we think he comes too late. If errors had been assigned by the plaintiff here, and joined by the defendant, no motion to dismiss for such a cause could be heard; and as no formal errors are usually assigned in this court, and none were assigned in this cause, we think the delay to make the motion is equal to a joinder in error, even if the clerk of the Supreme Court of Louisiana had no authority to issue the writ, on which we at present express no opinion.

LESSEE OF DANIEL W. GANTLY ET AL., PLAINTIFF, *v.* WILLIAM G. AND GEORGE W. EWING, DEFENDANTS.

A law of the state of Indiana, directing "that real and personal estate, taken in execution, shall sell for the best price the same will bring at public auction and outcry, except that the fee-simple of real estate shall not be sold to satisfy any execution or executions, until the rents and profits for the term of seven years of such real estate shall have been first offered for sale at public auction and outcry; and if such rents and profits will not sell for a sum sufficient to satisfy such execution or executions, then the fee-simple shall be sold," is not merely directory to the sheriff, but restrictive of his power to sell the fee-simple.

If he sells the fee-simple without having previously offered the rents and profits, his deed is void.[1]

The law of Indiana, passed after the execution was issued, also required that the property should be appraised. The sheriff's deed was not void, because of there being no appraisement.[2]

THIS case came up on a certificate of division from the Circuit Court of the United States for the district of Indiana.

*708] * The facts were stated by an agreement in the nature of a special verdict, and were as follows:

"On the twenty-fifth day of December, eighteen hundred and thirty-eight, one Jacob Linzee was indebted to Daniel W. Gantly, of the city of New York, in the sum of nine hundred and nine dollars and eighty-two cents; and, to secure the payment of the same, Linzee then executed to Gantly a mortgage on town lot numbered one hundred and seventy-nine, in Peru, Indiana, of which Linzee was seised in fee. At the time of the execution of the mortgage, Linzee was in possession of the mortgaged premises, and they were worth from one thousand to fourteen hundred dollars. Linzee made default in the payment, and Gantly, on the eighth day of September, eighteen hundred and forty, obtained a decree in the state court to foreclose the mortgage; and unless the money should be paid in sixty days, an execution was directed to be issued for the sale of the premises.

"In January, eighteen hundred and forty-one, an execution was issued, and on the thirteenth of February following, before the sale of the property, the appraisement law passed, and was published the twenty-third day of February, eighteen

[1] FOLLOWED. *Collier* v. *Stanbrough*, 6 How., 22.

The decisions in Indiana on the point decided, are as follows: *Piel* v. *Watson*, 44 Ind., 447; *Davis* v. *Campbell*, 12 Id., 192.

[2] FOLLOWED. *Howard* v. *Bugbee*, 24 How., 465. And see also,

Indiana Cent. Ry. Co. v. *Bradley*, 15 Ind., 23; *Davis* v. *Campbell*, 12 Id., 192; *Tyler* v. *Wilkerson*, 27 Id., 450; *Doe* v. *Craft*, 2 Id., 359; *Cummins* v. *Pfouts*, 13 Id., 144; *Woodruff* v. *Hoard*, 9 Id., 186.

Until the contrary is shown, it will be presumed there was an appraisement. *Mercer* v. *Doe*, 6 Ind., 80; *Evans* v. *Ashby*, 22 Id., 15.

A sale without appraisement on a judgment in favor of several claimants, a part of which was without appraisement, was held valid, the sale being on all of the executions at once, and no one of the judgments having priority. *Shirk* v. *Wilson*, 13 Ind., 129.

If the record shows a waiver of appraisement, the sale is valid without it. *Lemerters* v. *Johnson*, 12 Ind., 385; when presumed to be valid, *Small* v. *Eby*, 9 Id., 177.

In case of the sale being void, the execution defendant may sue in damages for the value of the property, or may set up such value as a set-off in an action against him by the execution plaintiff, if the execution defendant was the principal in the debt sued on. *Woodruff* v. *Hoard*, 9 Ind., 186.

In the absence of the sheriff's return, or in the absence of any statement in such return as to appraisement, it will be presumed that an appraisement was made. *Talbott* v. *Hale*, 72 Ind., 1; *McCarthy* v. *McCarthy*, 66 Id., 128.

hundred and forty-one; one the first of March, eighteen hundred and forty-one, the sheriff, having given due notice, sold the premises at public auction, to the defendants, for seventy-six dollars, and executed a deed to them for the same; which deed was offered in evidence to support the title of the defendants. The property was not valued, nor were the rents and profits offered for sale by the sheriff. And the court were asked to instruct the jury that, as the rents and profits had not been offered, nor the land valued, under the statutes of Indiana, the sheriff's deed was inoperative and void. And on this question the opinions of the judges were opposed; and on motion of plaintiff's counsel, the point is certified to the Supreme Court, under the act of Congress."

Cooper and *White*, for plaintiffs in error.
Hoban, for defendants in error.

The argument on behalf of the plaintiff in error was as follows:

The acts of the state of Indiana, which have relation to the question, are certified in the record.

Now as Linzee made default in the payment of the money the mortgage was given to secure, Gantly foreclosed the mortgage in the state court, under the provisions of the Revised Laws of Indiana, of 1831, pp. 244 and 245, and issued his execution, as required by that statute, requiring "mortgaged premises to be sold as other lands are sold on execution." All the proceedings, up to the time of issuing the execution, were strictly in accordance with the provisions of the statute above mentioned. And as the defendants claim as purchasers under the execution, they waive all objections to the previous proceedings. Cowp., 46.

* But I contend that the sheriff's deed to the defendants is inoperative and void, for the following reasons: [*709

1. Because the sheriff sold the fee-simple of the land, without having first offered the seven years' rents and profits of the same.

2. Because he did not have the land appraised before the sale of the same.

By the Revised Law of 1831, p. 235, sect. 3, it is enacted, "That real and personal estate, taken in execution, shall sell for the best price the same will bring at public auction and outcry; except that the fee-simple of real estate shall not be sold to satisfy any execution or executions, until the rents and profits, for the term of seven years, of such real estate, shall first be offered for sale at public auction and outcry."

Which appears to be a good and salutary law, enacted to prevent the sacrifice of the fee-simple of real property, to the cupidity of a heartless set of speculators, who hang round sheriff's sales, for the sole purpose of speculating off the misfortunes of their fellow-creatures. In England the fee-simple of land cannot be sold under execution, but the judgment-creditor can only take possession of the rents and profits, by a writ of *levari facias*, or take his extent under an *elegit*, but both of which remedies he could not resort to. A similar law, I believe, still prevails in Virginia. In New York, when the fee-simple has been sold under execution, the owner of the land is allowed a year from the time of the sale to redeem the land. In Ohio, lands are required to be appraised before they can be sold under execution. And I never have learned that either the constitutionality, or the policy, or the propriety of either of the laws of New York or Ohio, have ever been questioned.

Then, to give a fair construction to the statute of this state last recited, it must inevitably appear that the offering of the rents and profits was made a condition precedent by the statute to the sale of the fee-simple of the land in controversy, and that a sale, without such previous requisition having been first complied with, is null and void.

Sheriffs in this state receive the whole of their power and authority from the statute laws of the state. They have no common law powers nor implied powers, and it would be dangerous to trust them with either. But, on the contrary, it has been said by the Supreme Court of this state that it may be safely presumed, by a *bona fide* purchaser at sheriff's sale, that the sheriff had done his duty in obeying the directions of the statute as respects the inquest, the advertisement and sale, &c. 1 Blackf. (Ind.), 210.

But in the present case the defendants could not be *bona fide* purchasers; the very idea is repelled by the gross inadequacy of the price they bid and gave for the same. We cannot presume that the defendants supposed the rents and profits had first been offered, when the proof is positive that they had not been offered. Presumption can never outweigh positive proof.

*710] * The improper conduct of the sheriff in selling property may be inquired into, in an action of ejectment on his title, and the owner of the land would have a right to prove on the trial that it was known to the purchasers that the rents and profits had not been offered for sale by the sheriff. 4 Blackf. (Ind.), 228.

In the present case, as the property was sold for a price

grossly inadequate, and the sheriff never offered the rents and profits, as is proved on the trial, every presumption is against the defendants.

I now come to the second point, that the property had not been appraised before the sale was made.

It appears from the testimony certified of record, that the execution under which the property in question was sold, was issued in January, A. D. 1841; that on the 13th of February, and before the sale, the legislature passed the appraisement law; and that the same was published on the 23d of February, A. D. 1841, being five days before the sale of the property in question, by the sheriff, to the defendants; which law was in force, and was, by the 14th section of the same, to take effect from and after its passage. *Vide* Law of 1841, p. 130–132.

In the case of *Tredway* v. *Gapin*, 1 Blackf. (Ind.), 299, "it was said by the Supreme Court, that from the time a statute is published in print, by authority, at any place within the state, it takes effect in every part of it, unless the act itself otherwise directs."

This statute being in force at and before the time of sale of the property in question, by the sheriff to the defendants, the defendants have no title to the premises, unless they show that it had been strictly complied with; the 6th section of which statute is as follows: "That hereafter no real property shall be sold on execution for less than for one-half its cash value at the time of such sale." And the 7th section of the same law points out the form of the appraisement and return at the cash value at the time of the appraisement; which statute is not only directory to the sheriff, but it in positive and direct terms prohibits any sale of land under execution, unless the statute has first been complied with.

In the case of *Tweedy* v. *Pickett*, 1 Day (Conn.), 109, it was decided by the Supreme Court of Connecticut, that, "in order to make out a title to land by the levy of an execution, it must be shown the appraisers were indifferent freeholders, and that they were sworn according to law." And in the case of *Mitchell* v. *Kirtland*, 7 Conn., 229, the law is laid down to the effect following:

"The acquisition of title by execution being a proceeding *in invitum*, the requisites of which are prescribed by positive law, in derogation of the common law, a strict compliance with these requisites is indispensable to a transfer of the title." *Vide* also, the case of the *United States* v. *Slade*, 2 Mason, 70.

And by the statute of Indiana, approved January 6th, 1821, (Laws of 1820, 1821, p. 4,) it is enacted "that no real prop-

erty shall be *sold for less than one half of its real value, by virtue of any execution which may hereafter issue on a judgment which has heretofore been rendered, or which may hereafter be rendered," &c.

Shortly afterwards the Supreme Court of Indiana were called on to give a proper construction to the last mentioned statute, and it decided that a bid and sale of land offered at sheriff's sale under execution under that statute, where the purchaser did not bid half the apraised value of the land, and a sheriff's deed under such a bid and sale, were void, and conveyed no title to the purchaser. See *Harrison et al.* v. *Doe*, on the demise of Rapp, 2 Blackf. (Ind.), 1; which case, I think, clearly settles the construction of the recent appraisement law, and is in accordance with the cases cited in Connecticut, and the case in Mason's Reports. And they all go to establish the position taken, that, inasmuch as the land was not appraised before the sale, the sheriff's deed to the defendants is inoperative and void.

If the title to the defendants be good under this deed, they (the defendants) get the property for less than a tenth part of the value, and Gantly will have to lose nine-tenths of the money Linzee has so long and justly owed him; which, I think, clearly shows the sale by the sheriff to the defendants to be fraudulent and void.

In the third resolution in *Fermor's* case, 3 Co., 78, the court said that "the common law doth so abhor fraud and covin, that all acts, as well judicial as others, and which of themselves are just and lawful, yet being mixed with deceit, are in judgment of law wrong and unlawful."

The question whether a deed be fraudulent and void as to creditors, may be examined and decided in an action of ejectment. 2 Black., 230.

It would be unnecessary to produce further authority in support of the second objection to the deed of the sheriff in this case.

It has, however, been contended by the counsel for the defendants, that the appraisement law of our state, of 1841, is unconstitutional, and, therefore, that the lessor of the plaintiff has no right to complain of its violation; and the case of *Bronson* v. *Kinzie et al.*, 1 How., 311, is by them referred to to support their position. But I am wholly at a loss to find out the least spark of resemblance between the cases. If Gantly (the lessor) had bought the property in question for a nominal price, without the same having first been appraised, and Linzee commenced a suit against him to recover the property, it might have raised a different question to that now

before your honors. But, in the present case, the defendants bought the land at sheriff's sale in violation of the appraisement law, after the same was in force. The appraisement law, at the time of the purchase, was the law of the land, entered into and became a part of the contract between the defendants and the sheriff, and if it was *unconstitutional, it would make the argument so much the stronger for setting aside the sale. [*712

A law may be constitutional in its application to some cases, and void as to others. 8 Pet., 94. The law might have been unconstitutional between Gantly and Linzee, and constitutional between the defendants and the sheriff.

Hoban, for defendants in error, after stating the case, proceeded as follows:

From the above statement, which is taken word for word from that of the plaintiff in error, it appears that the title of the defendants in error to the premises in dispute is admitted, unless the sheriff's deed is inoperative, and the deed is assailed upon these grounds: first, because the sheriff sold the fee-simple of the land without first having offered the seven years' rents and profits of the same—and this is supposed to be required by the act of the legislature of Indiana of 1831, sections 8 and 18. It must be premised that this law is prior in date to that of the mortgage, which was in 1838. It will appear from the law itself that it applies only to executions on judgments at law; section 18 applies to decrees in equity, which provides that sales under them are to take place at public vendue to the highest bidder, as on execution on judgments at law. In the nature of things a law of this kind could not apply to a chancery decree, which orders a specific thing to be done in a manner by the law itself expressly declared to be, as the court may determine "in the premises between the parties, as may be right and just." I do not deem it necessary on this point to do more than to refer the honorable court particularly to section 18 of the law, where the sale of the land and the making of an unencumbered deed to the purchaser are spoken of, but no mention of a valuation of the land, or restriction of the court, first to order the sale of the rents and profits for seven years, before decrees of the unconditional sale of the premises.

The second objection is, that the land was not appraised pursuant to the act of the legislature of Indiana of February 13, 1841, which requires, as it appears, that land shall not be sold on execution, except after being appraised, and then only after more than half the value is bid.

The first answer to this is, that the law applies to sales on executions, which, in *Bronson* v. *Kinzie*, 1 How., 311, is admitted not to apply to sales under mortgage foreclosures.

But if the law be admitted, and be particularly framed, to apply to a case of this kind—still it is clearly unconstitutional. The law of Indiana is of 1841; the date of the mortgage 1838. I shall refer your honors only to *Bronson* v. *Kinzie*, 1 How., 311, where the leading cases are referred on this subject; *Green* v. *Biddle*, *Sturges* v. *Crowningshield*, *Ogden* v. *Saunders;* these cases, as laboriously *and ably argued as any on record, decide this general principle, that a state law which materially varies the well ascertained remedy upon a contract, is as to contracts in existence at the time of its passage, in the sense of the amendment of the Constitution, a law impairing the obligation of a contract, and which in consequence no state has a right to pass. *Bronson* v. *Kinzie*, 1 How., 311, applies this principle specifically to a case of the very character now under consideration, and decides that a law extending the time of credit under a mortgage foreclosure, and prohibiting the sale of the mortgage premises, unless after valuation, and unless they produce a certain sum or value, as such an invasion of the ascertained remedy, at the date of the contract or mortgage, (and rendered in legal contemplation a part of the compact between the parties,) as to come within the prohibition intended by the Constitution. This law prohibits the sale of the premises until it may be made to produce one-half its value by assessment, which may never be.

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Mr. Justice CATRON delivered the opinion of the court.

This case comes before us on a certificate of division from the Circuit Court for the district of Indiana. As the facts fully appear in the statement of the reporter, they need not be repeated at large here. The action was an ejectment; the defendants set up a sheriff's deed, and the court was asked to instruct the jury that the deed was void for two reasons: First, because the rents and profits had not been offered for sale before the fee-simple was sold: Second, nor had the land been valued under the statutes of Indiana before the sale was made.

The first ground of objection involves the construction of the 3d section of the act of February 4, 1831, which is in the following words:

"That real and personal estate, taken in execution, shall sell for the best price the same will bring at public auction and outcry, except that the fee-simple of real estate shall not be sold to satisfy any execution or executions, until the rents

and profits for the term of seven years of such real estate shall have first been offered for sale at public auction and outcry; and if such rents and profits will bring a sum sufficient to satisfy the execution or executions levied thereon, the sheriff, or other officer, selling the same, shall make to the purchaser thereof a deed conveying to such purchaser a term of seven years in and to such real estate: and moreover forthwith deliver immediate and actual possession thereof; and if such rents and profits will not sell for a sum sufficient to satisfy such execution or executions, then the fee-simple, or other estate, of the execution defendant or defendants, shall be sold, and a deed, conveying the same to the purchaser thereof, shall be executed by the officer selling the same."

By this provision the sheriff was governed in making the sale; if *it was merely directory to the officer, then the deed cannot be assailed; but if it contains an inhibition to sell the fee, until the rents and profits are first offered, and the authority to sell the fee in this instance, did not exist before, then the sale was void: as it is admitted on the record, that the rents and profits were not offered by the sheriff. Had this fact not been established, then we are of opinion the court would have been bound to presume the sheriff did his duty, and that the sale, and deed founded on it, were valid: they being *prima facie* valid, the proof to assail them must come from the opposing side, be it negative or affirmative. This is the general rule applicable to all proceedings of courts where they have and exercise general jurisdiction; and of this description is the court of Indiana, from which the execution issued. This being conceded, the question is, Does the established fact annul the sale? At common law the fee in lands by a *fieri facias* is not subject to sale; the sheriff's authority to sell in this country is in the nature of a naked power conferred by statute; he takes no title in the land by the levy, as he does in goods, and can confer none on the purchaser, if power to sell is wanting. We admit if the words of a law are doubtful, the sale should be supported, and the benefit of any obscurity in the statute be given to the purchaser, lest he should be misled in cases where a general power is given to the sheriff to sell, and this is limited by indefinite restrictions; and that the safer rule is to hold such restrictions to be directory. Further than this, no general rule need be asserted. Giving the act in question the benefit of these favorable intendments, and what authority did it confer on the sheriff. [*714

The general power to sell lands at auction and outcry is given, but then follows the explict restriction, that the fee-

simple shall not be sold until the rents and profits shall have been first offered at public auction and outcry; if they bring the amount of the execution, the sheriff is to convey to the purchaser the term of seven years and put him forthwith into possession. Had the power to sell stopped here, then no authority to convey the fee could exist; and the question is, when did the power arise? We think, on the failure of the sheriff to get a bid of the whole amount of the levy for a term of seven years; as before, the fee could not be sold. Nor can we see how the legislature could have made the exception more explicit, unless negative language had been used, repeating the inhibition; and for this there was no necessity, as the statute conferred a power not known to the common law, and which could only be given affirmatively, and which was not given at all, save with the positive restriction imposed in advance.

To treat the exception as directory to the sheriff would violate, as it seems to us, the general spirit of the laws of Indiana; they cautiously endeavor to maintain debtors in *715] possession and to preserve their houses, at the same time that a remedy is afforded to creditors *against lands. It not being our province, however, to construe the state laws on this point, so as to give any binding effect to the adjudication on the courts of Indiana, we forbear to go into an examination in detail of what we suppose to be the policy of that state.

One consideration has been much pressed on us, to wit, That the purchasers here are not proved to have had notice of a failure on the part of the sheriff to offer the term of seven years for sale first. It is admitted if such notice had been proved, the sale would be void.

In our opinion the purchaser must be held to notice. The statute contemplates a sale of the term; or an offer to sell it, and a failure, and this at public outcry, at the same time and place, and immediately preceding the sale of the fee: He who goes to purchase and is present at the sale, and does purchase, rarely if ever can want actual knowledge, as the open outcry and public auction of the term is to be as notorious as that by which the fee is sold; and even should the purchaser of the latter not be present at the opening of the vendue, the slightest diligence would command information whether the requisite previous step had been taken. To treat a bidder at the sale in any of its stages, as an innocent purchaser, we think would be dealing with him in a manner too indulgent; as it is quite certain in no other instance could the doctrine of innocent purchaser be applied to one having equal oppor-

tunities of knowledge, aside from any duty imposed on him to acquire it. Furthermore: this would in almost every case of the kind narrow down the issue to a single point—whether the purchaser had or had not notice; leaving the jury to determine on the validity of the title, by the exercise of an undefined discretion; its verdict being founded on an exception *in pais*, and on one the legislature did not see proper to make. This is a question of power, and the answer to the suggestion rests on this. The sheriff's duties are plainly prescribed; if he has no power to sell, want of knowledge on part of the purchaser could not confer it, and no such contingency can be let in to help his deed.

It is insisted the question has been settled by the Supreme Court of Judicature of Indiana, in the case of *Doe* v. *Smith*, 4 Blackf. (Ind.), 228, that the purchaser at execution sale takes a good title to the fee, although the land had not been previously offered for sale by the sheriff for the rents and profits of a term of seven years.

That case does not so settle the point as to satisfy us. It applies to a sale, made pursuant to the act of January 30, 1824, sect. 3; it is in substance like that set forth above, of 1831, but much less stringent and precise in its terms of exclusion, so that the first might be held directory to the officer, and the last an inhibition, if the decision was to the precise effect contended for, which it is not. For another reason we suppose the question not to be settled in Indiana. The certificate of division, although not exclusively contrary to the assumption that the question has been settled, must [*716 still be treated *by us as assuming *prima facie*, that the construction of the statute is open, and that it requires settlement here for the purposes of the case; as to no other and could the question be brought here in its present form.

It is proper to remark, that it would be our duty on this point to follow the construction of the Supreme Judicial Court of Indiana, had it settled any; and this we would the more cheerfully do from the confidence we have in that tribunal; but nothing can be deemed as settled by the court of last resort in a state, unless it has adjudged the direct question; or unless the subject has, in an indirect form, and at various times, been brought before such court and treated as conclusively settled, and not open to controversy. This not appearing to be the case, it is certified to the Circuit Court that the sheriff's deed is void for the reasons stated.

2. The next question certified is, whether the sheriff's deed is void, because the land was not valued according to the statute of Indiana before the sale took place.

Linzee owed Gantly, who took a mortgage on a town lot, of which Linzee was seised in fee. This occurred in 1838. The debt was for $909, and the property mortgaged worth more than the debt. Linzee made default, and Gantly filed his bill to foreclose. In September, 1840, he obtained a decree of foreclosure, on which an execution issued in January, 1841. On the 13th of February following, the appraisement law was passed. The sheriff sold the property on the 1st of March, 1841, to the defendants.

1. The act of 13th February provides, that the debtor may redeem real estate sold under execution founded on a judgment or decree, at any time within twelve months from the day of sale, by paying the money into the clerk's office, with interest thereon, at the rate of twelve and a half per cent.

2. That junior encumbrances may redeem in like manner.

3. That if the judgment debtor neglected, or was unable to take the stay by the laws then in force, the property should be sold on a credit, equal to the stay, and bond be taken by the officer selling, for the purchase money.

4. That thereafter no property should be sold on execution for less than one half of its cash value at the time of the sale, to be ascertained by three freeholders at the instance of the officer: and if the property did not sell for half the value, the fact was to be returned on the execution, and another might issue subject to the same conditions.

The decree ordering foreclosure was made in conformity to the existing laws, at the date of the mortgage, and of the decree. An execution sale was the appropriate mode of foreclosure, and this without any of the restrictions contained in the act of February 13, 1841. The decree followed the pro-
*717] visions of the 18th section of the act of 1831, chap. 36. *The contract of mortgage was a vested interest, and its main incident a right to have the land applied in discharge of the debt, either by an execution executed, as on a judgment at law, or in some form of remedy substantially equal. The new remedy, prescribed by the act of 1841, changed the contract, and required among other things that the mortgaged premises should not be sold to satisfy the debt unless they were first valued, and one-half of that value was bid for them. If the legislature could make this alteration in the contract, and in the decree enforcing it, so it could declare the property should bring its entire value, or that it should not be sold at all; thereby impairing, or defeating the obligation under the disguise of regulating the remedy. This court held in *Bronson* v. *Kinzie*, 1 How., 319, that the right, and a remedy substantially in accordance with the right, were

equally parts of the contract, secured by the laws of the state where it was made; and that a change of these laws, imposing conditions and restrictions on the mortgagee, in the enforcement of his contract, and which affected its substance, impaired the obligation, and could not prevail; as an act directly prohibited, could not be done indirectly. This being the settled doctrine of the court, and applying as forcibly to the case before us, as it did to the one cited, we answer to the second ground of objection, that the sheriff's deed is not void on this ground, although no valuation of the property was made before the sale.

WILLIAM H. MCFARLAND *v.* WILLIAM M. GWIN, (LATE MARSHAL.)

A marshal is not authorized by law to receive any thing, in discharge of an execution, but gold and silver, unless the plaintiff authorizes him to receive something else.

The case of *Griffin et al.* v. *Thompson*, 2 How., 244, reviewed and confirmed.

A marshal, like a sheriff, is bound, after the expiration of his term of office, to complete an execution which has come to his hands during his term; and an execution is never completed until the money is made and paid over to the plaintiff, if it is practicable to make it.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the southern district of Mississippi.

McFarland had recovered a judgment against one Passmore for the sum of $9,763.10, and on the 6th of July, 1839, issued a *fieri facias*.

On the 1st of November, 1839, the execution was levied upon sundry pieces of property by the marshal.

On the 20th of December, 1839, a *venditioni exponas* was issued, to which the marshal made the following return:

"The within named property was sold on the 27th day of January, *1840, and I received in payment therefor, on [*718
that day, the sum of nine thousand dollars in the post notes of the Mississippi Union Bank, which are herewith returned. Received, also, on the same day, the balance of the execution from the defendants, in the same kind of money, which is likewise herewith returned.

"WM. M. GWIN, Marshal.
Per J. F. COOK, Deputy."

Attorney's Receipt.

"May 22d, 1840. Received of Wm. M. Gwin, marshal, the sum of five hundred and fourteen $\frac{15}{100}$ dollars, being the amount of my commissions, I having refused to receive the balance belonging to the plaintiff, as the same was tendered me by Mr. Gwin in Union Bank of Mississippi post notes, in which kind of money he says and returns that it was collected. "WM. R. T. CHAPLAIN, Pl'tff's Att'y."

At November term, 1841, McFarland, by his counsel, moved the court for a judgment against Gwin for the amount due on the original judgment, with interest at the rate of eight per cent. from the 14th of May, 1839, to the 27th of January, 1840, and for interest upon the aggregate sum at the rate of thirty per cent. per annum, from the 22d of May, 1840, until paid.

The motion was submitted to the court upon the following agreed case, viz.:

(The writs and returns were stated, and then the agreement continued thus:)

"And it was proved that the money was demanded on the 22d day of May, 1840; also, that at that date the Union post notes were at forty per cent. discount.

"The defendant proved, that on the demand he tendered the post notes of the Mississippi Union Bank, which were refused by the attorney of the plaintiff. He also proved, that from August, 1838, when the Mississippi Union Bank went into operation, until about the middle of February, 1840, the post notes of that bank constituted nearly the entire circulating medium of the state. That they had been treated as cash in all business transactions during that time. That they were habitually and ordinarily received by the sheriffs throughout the state in satisfaction of executions, and in payment of property sold under them. That the marshal had been accustomed, during all that time, to collect the post notes of said bank upon executions; and that the attorneys of the court, and plaintiffs in executions, had always, without objection, received such notes from the marshal as money. That on the 27th day of January, 1840, the day of sale, the post notes of said bank were worth five or six per cent. less than specie, and were worth more than they had previously been. That
*719] about the middle of February, *1840, they suddenly depreciated in value, and continued to decline until the 22d May, 1840.

"The above was all the evidence in the case.

H. S. EUSTIS,
W. YERGER."

Upon this statement of facts, the court were of opinion that judgment should be entered for the defendant. To which opinion of the court, the plaintiff, by his counsel, excepted, and upon this exception the case came up.

Coxe, for the plaintiff in error.
Walker, for the defendant in error.

Mr. Justice McKINLEY delivered the opinion of the court.

McFarland recovered judgment against Ellis P. Passmore, for the sum of $9,763.10 in the Circuit Court of the United States, for the southern district of Mississippi; and on the 6th day of July, 1839, a *fieri facias* issued thereon, directed to the marshal of the southern district of Mississippi, commanding him, that of the goods and chattels, lands and tenements of the said Ellis P. Passmore, he should cause to be made the said sum of $9,763.10, upon which *fieri facias* the marshal returned, that he had levied of the goods and chattels, lands and tenements of the defendant sufficient to satisfy the *fieri facias;* but which property had not been sold for want of time.

And thereupon a *venditioni exponas* issued to the marshal, commanding him to expose to sale the goods and chattels, lands and tenements levied on, upon which he returned, that he had sold the property levied on, and received the full amount of the *fieri facias*, in the post notes of the Mississippi Union Bank. The attorney for the plaintiff received of the marshal $514.15, being the amount of the attorney's fees; for which he gave a receipt, but refused to receive any part of the notes for the plaintiff. At the November term, 1841, of the Circuit Court, the plaintiff moved the court for judgment against the marshal for the amount of the *fieri facias* and interest thereon. On the trial of the motion, it was proved by the plaintiff, that the money was demanded on the 22d day of May, 1840; and at that date the post notes of the Union Bank were selling at a discount of 40 per cent. Gwin, the defendant, proved that on the demand made, he had tendered the post notes of the Union Bank, which were refused by the attorney of the plaintiff; and that from August, 1838, when the Mississippi Union Bank went into operation, until about the middle of February, 1840, the post notes of that bank constituted nearly the entire circulating medium of the state; that they had been treated as cash in all business transactions during that time, and had been received by the marshal and the sheriffs of the state in payment of

executions. And *thereupon the court rendered judgment against the plaintiff, and for the defendant.

To reverse this judgment the plaintiff has prosecuted this writ of error.

This question is fully settled in the case of *Griffin & Ervin* v. *Thompson*, 2 How., 244. In that case this court held, that the marshal was not authorized by law to receive any thing in discharge of the execution, but the gold or silver coin of the United States. To this general proposition we give our full assent; but we do not mean to say there is no exception to this general rule. If the plaintiff were to authorize the marshal to take bank notes, of any description, in payment of the execution, we have no hesitation in saying, a payment by the defendant to the marshal in such bank notes would be a satisfaction of the judgment.

But as Gwin failed to prove any such authority from the plaintiff, he was clearly liable for the whole amount of the execution with legal interest thereon, except the amount paid to the plaintiff's attorney. It has been contended, however, in this case, that, at the time this motion was made, Gwin was not marshal, his time having expired, and another having been appointed in his stead. It is a well settled principle of law, that if an execution come to the hands of a sheriff to be executed, and his term of office expire before he executes it, he is bound nevertheless to complete the execution; and the same rule applies to a marshal. An execution is never completed until the money is made and paid over to the plaintiff, if it be practicable to make it.

All the remedies against the marshal, necessary to compel him to pay over the money he has made, survive his term of service, and remain in full force against him until the execution shall be completed. The judgment of the Circuit Court must, therefore, be reversed.

NEIL, MOORE & COMPANY, PLAINTIFFS IN ERROR, *v.* THE STATE OF OHIO, DEFENDANT.

Under the acts of Congress and of the state of Ohio, relating to the surrender and acceptance of the Cumberland road, a toll charged upon passengers travelling in the mail stages, without being charged also upon passengers travelling in other stages, is against the contract, and void.[1]

[1] FOLLOWED. *Achison* v. *Huddleson*, 12 How., 296.

It rests altogether in the discretion of the postmaster-general, to determine at what hours the mail shall leave particular places and arrive at others, and to determine whether it shall leave the same place only once a day or more frequently.

It is not, therefore, the mere frequency of the departure of carriages, carrying the mail, that constitutes an abuse of the privilege of the United States, but the unnecessary division of the mail bags amongst a number of carriages in order to evade the payment of tolls.

THIS case was brought up under the 25th section of the Judiciary Act, by writ of error, from the Supreme Court of Ohio.

*It involved the construction of the acts of Congress and the state of Ohio, relative to the cession of the [*721 Cumberland road, which are narrated in a preceding part of this volume, in the case of *Searight* v. *Stokes et al.*, p. 151.

It is proper, however, to state the law of Ohio with more particularity than it was necessary to do in the report of that case. The proviso contained in the 4th section of the act of 1831, was there recited, but the 5th section was not. They are as follows:

Sect. 4 lays tolls, and adds: "Provided, That nothing in this act shall be construed so as to authorize any tolls to be received or collected from any person passing to or from public worship, or to or from any muster, or to or from his common business on his farm or woodland, or to or from a funeral, or to or from a mill, or to or from his common place of trading or marketing, within the county in which he resides, including their wagons, carriages and horses, or oxen drawing the same: Provided also, That no toll shall be received or collected for the passage of any stage or coach conveying the United States mail, or horses bearing the same, or any wagon or carriage laden with the property of the United States, or any cavalry or other troops, arms or military stores belonging to the same, or to any of the states comprising this union, or any person or persons on duty in the military service of the United States, or of the militia of any of the states.

"Sect. 5. That it shall be lawful for the General Assembly, at any future session thereof, without the consent of Congress, to change, alter, or amend this act: Provided, That the same shall not be so changed, altered, or amended, as to reduce or increase the rates of toll hereby established, below or above a sum necessary to defray the expenses incident to the preservation and repair of the said road, to the erection of gates and toll houses thereon, and for the payment of the fees or salaries of the superintendent, the collectors of tolls, and of such other agents as may be necessarily employed in the preserva-

tion and repair of the same, according to the true intent and meaning of this act."

On the 6th of February, 1837, the state of Ohio passed an act, containing, among other provisions, the following, viz.:

"Sect. 4. That one daily stage, coach, or other vehicle, and no more, with the horses drawing the same, belonging to any contractor or contractors for carrying the United States mail on said road, with the passengers therein, shall be permitted to pass in each direction free from the payment of tolls; and each additional stage, coach, or other vehicle belonging to such contractor or contractors, although the same may contain a mail, or portion thereof, shall be charged with the same tolls as other vehicles of the like kind. But if the postmaster-general shall order the mail to be divided, and carried in two or more stages, coaches, or vehicles, in any one direction daily, then in such case the coaches or vehicles in which mails *722] *shall actually be carried, shall pass free of toll; but on each passenger transported in any such additional stage, coach, or vehicle, there shall be charged and collected at each gate, three cents, in manner hereinafter provided.

"Sect. 5. That each and every driver of any stage, coach, or other vehicle, belonging to any such mail contractor or contractors, other than such as are entitled to carry passengers free of toll, shall, at each and every gate, report the number of seats occupied in such stage, coach, or other vehicle, to the keeper of such gate, whose duty it shall be to open an account against the proprietor or proprietors of such stage, coach, or other vehicle, and charge, in a book to be kept for that purpose, three cents for each passenger, as provided in the preceding section of this act; and said proprietor or proprietors shall pay over to such gate keeper, at the end of every three months after the taking effect of this act, the aggregate amount of tolls which shall have become due for passengers, and charged as above provided.

"Sect. 6. That should the driver of any stage, coach, or other vehicle, belonging to such mail contractor or contractors, other than such as are entitled to carry passengers free of toll, neglect or refuse to report to any gate keeper the number of seats occupied in said stage, coach, or vehicle, it shall be the duty of such gate keeper to charge the proprietor or proprietors of such stage, coach, or other vehicle, at the rate aforesaid, for each and every seat which might be occupied in the same, to be recovered in an action of debt, in the name of the State of Ohio, in any Court having competent jurisdiction.

"Sect. 8. That the board of Public Works, or their authorized agent, may be allowed to collect tolls from any proprietor

or proprietors of any line of stages, post-coaches, or other vehicles for the conveyance of passengers, quarterly; and if any proprietor or proprietors of any such line of stages, post-coaches, or other vehicles as aforesaid, shall neglect or refuse to pay quarterly, that from and after such neglect or refusal, the said proprietor or proprietors as aforesaid shall be required to pay at each and every gate as they pass: Provided, That the Board of Public Works, or their authorized agent, shall have made out and presented to any such proprietor or proprietors, or any one of them, the amount of the toll due from him or them for each and every gate."

The act of the legislature, of March 19, 1838, provides as follows:

"Sect. 24. That the said Board of Public Works shall have power to revise the rates of toll to be paid by persons passing on or using the National road in Ohio, and so to modify the same, from time to time, as to raise and collect, in the most equal manner, the sum necessary to defray the expenses incident to the preservation and repair of said road, to the erection of gates and toll-houses thereon, and for the payment of the fees or salaries of the superintendent, the collectors of tolls, and of such other agents as may be necessarily employed in *the repair and preservation of the same, according [*723 to the true intent and meaning of the act, passed February 4th, 1831, entitled 'An act for the preservation and repair of the United States road.'"

The order of the Board of Public Works, above referred to, is as follows:

"By virtue of the powers vested in the Board of Public Works, by the 24th section of the act 'in addition to an act for the preservation and repair of the United States road,' passed March 19th, 1838, it is hereby

"Ordered, That instead of the rate of toll charged on each passenger by the 4th section of the act 'fixing the rates of tolls on the National road,' passed February 6th, 1837, there shall be charged ten cents, at each gate, on each of such passengers."

In October, 1842, a suit was brought in the Court of Common Pleas, in Franklin county, against Neil, Moore & Co., for tolls on passengers conveyed in stages by the defendants, on the National road, and the following agreed statement of facts was filed:

"In this case, the following facts are agreed by the parties: The partnership of the defendants, as alleged, is admitted. The plaintiff claims to recover for tolls on passengers carried upon the National road, in Ohio, in coaches belonging to the defendants, other than and besides one daily stage-coach, carry-

ing the mail of the United States; which said coach, with the horses, passengers, and every thing else pertaining to it, was permitted to pass toll free. The order of the Board of Public Works, hereto annexed, was made in due form, at the date thereof, and is to be admitted in evidence. The passengers upon whom toll is sought to be recovered, were carried by the defendants, as above mentioned, between the first days of April and October, A. D. 1842. The defendants were contractors for carrying the mail of the United States upon said road, and said passengers were all carried in coaches in which a part of said mail was carried at the same time; the mail being thus carried in more than one coach, pursuant to orders from the postmaster-general; one coach, containing a part of the mail, and the passengers, and baggage, and every thing on it, being, at the same time, permitted to pass toll free, as above stated. The mail was carried in one line of coaches, down to the time stated in the annexed statement of the postmaster-general, which, together with the accompanying orders of the department, are taken in evidence in this case. Both before and since the construction of the National road, it was the uniform practice, in Ohio, to carry passengers on the coaches carrying the mail; and since the construction of the National road, no claim was made for toll on such passengers, or coaches, or on any thing pertaining to them, except as shown by the case of *The State of Ohio* v. *Neil and Moore*, 7 Ohio, 132. Until the mail was carried in two separate lines of coaches, as specified in the said statement of the post-master-general, and in the manner and for the *purpose therein mentioned, the defendants were required to carry the mail in two separate lines of coaches, and did so carry it accordingly. It is admitted that the acts of the legislature of Ohio, and the orders of the Board of Public Works, in existence when the tolls in question accrued, did not reduce or increase the rates of toll, hereby established, below or above a sum necessary to defray the expenses incident to the preservation and repair of the said road, to the erection of gates and toll-houses thereon, and for the payment of the fees or salaries of the superintendent, the collectors of tolls, and of such other agents as may be necessarily employed in the preservation and repair of the same; but it is not intended by this admission to preclude the defendants from objecting to the validity or legality of said charge of toll upon passengers, upon any ground they may think proper to take in the argument. It is understood and agreed that this case shall not in anywise prejudice the rights of the plaintiff, nor of the defendants, in any other suit, upon any demand not included in the

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facts hereby agreed. For the mutual convenience of the parties, this case is narrowed down so as to present only the question arising upon the facts above stated. Any material fact left out in this agreement, may be supplied, by proof, on the trial, by either party, after giving the other party reasonable notice of such intention. It is agreed by the parties that the whole number of passengers charged with toll at all the gates, between the first days of April and July, A. D. 1842, was ten thousand seven hundred and fifty-six, and that the whole number chargeable between the first day of July and October, A. D. 1842, was twelve thousand six hundred and seventeen; and that if the plaintiff be entitled to recover, judgment shall be entered for the sum of $1075.58, with interest from the first day of July, 1842, and $1261.67½, with interest from the first day of October, A. D. 1842, and costs, or for such other sums as may be due, computing the tolls on said passengers at any other rate than that fixed by the Board of Public Works, if the court deem it competent to adopt any other rate, with interest on the gross sums due on the first days of July and October above mentioned, from those times respectively, and costs."

The Court of Common Pleas were of opinion that judgment should be entered for the plaintiff, and the damages were assessed at $2438.25.

The defendants carried the case to the Supreme Court of Ohio, where, in December, 1843, the judgment of the court below was affirmed, and the following certificate was annexed to the record.

"And it is hereby certified, that on the trial of this cause the defendants set up and claimed the right and authority to transport, in their two daily lines of mail-coaches, which carried the United States mail, under a contract with the postmaster-general, and by the authority of the United States, passengers travelling therein, free of toll, along the United States road, in the state of Ohio, and *through [*725 the toll-gates erected by the said state thereon; that the said defendants set up and claimed this power and authority under and by virtue of the act of Congress approved the 2d day of March, A. D. 1831, entitled, 'An act declaring the assent of Congress to the act of the General Assembly of the state of Ohio,' recited therein; and that in said case there were drawn in question the construction, effect, and validity, of said act of Congress, and the right and authority claimed by the said defendants under the United States, by virtue thereof, and that the decision was against the validity of said act to confer the right and authority so claimed."

The defendants sued out a writ of error, to bring this decision of the Supreme Court of Ohio before this court.

Ewing, (in writing,) for plaintiffs in error.
Swayne, for defendant in error.

Ewing referred to the law of Ohio, passed in 1838, and the order of the Board of Public Works, (both of which have been already cited,) and then proceeded thus:

Under this law and this order, there was charged against the plaintiffs in error, on passengers transported in one of their lines of coaches, in which they carried the United States mail, by order of the postmaster-general, a large amount of tolls, which charge, as stated in the agreed case, is the foundation of this suit.

I contend that the second proviso in the 4th section of the statute of Ohio, of February 4th, 1831, which exempts from the payment of toll "any stage or coach conveying the United States mail," &c., when assented to by the act of Congress of March 2d, 1831, became and was an essential part of a contract, over which Ohio alone had no power or control. On the other side, I understand, it will be contended that the 15th section of the statute reserves to Ohio the right to alter or abolish that exemption at pleasure. This is the first question which we present for the consideration of the court.

If we leave out of view the 15th section, this statute, as assented to, is clearly a contract. By it the United States surrenders the road to Ohio, in consideration of which Ohio agrees to levy tolls, and keep the road in repair, and suffer the mails and other property of the United States to pass along it toll free. Now, could it have been the intent of the contracting parties to put it in the power of one of them to annul at pleasure a valuable provision of that contract, and is such intent unequivocally expressed in the 15th section? I think not. It is not reasonable to suppose it, and the statute does not necessarily require, if, indeed, it will admit of a construction which will allow it.

The first four sections of the statute contain, 1st, a contract. 2d, The means in detail, by which Ohio proposes to execute it on her part, couched in very special directions to the governor to that effect. *The contract was not properly an act of the legislature, and I do not admit that it was so considered or treated of in the 15th section. But all those matters which did not pertain to the contract, those provisions which touched not its execution, but the

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mode and manner of its execution, fell at once within the sovereignty of Ohio; and the statute, so far as it relates thereto, became and was, to all intents and purposes, an act of her legislature. Now, there are here a contract and a statute. Ohio reserves the right to "change, alter, and amend" the statute, but surely not to change, alter, and amend the contract. Indeed, if there be a contract, such a provision would be void, because it would be inconsistent with and destructive of it. But the two provisos in the 4th section, and the proviso in the 15th section, do all, as I think, look to the distinction between that which is contract, and that which is merely a legislative act.

The first proviso in the 4th section, which makes some domestic exemptions from toll, with which Congress had nothing to do, (such as persons going to market, to public worship, &c.,) is couched in this language, "provided, that nothing in this act shall be so construed as to authorize" the collection of tolls from such objects; but it does not say that no tolls shall be collected from them. This statute does not authorize such collection, yet some future act may. But the second proviso which follows this immediately, and which might have been included under the first, without any "provided also," had it not been intended to place the two subjects in totally different categories, declares "that no toll shall be received or collected for the passage of any stage or coach conveying the United States mail," &c.—not confining it to the construction of this statute merely, as in the other case, but a universal prohibition, extending to all future time.

The proviso in the 15th section seems to contemplate alteration and amendment in the rates of toll, not in the objects on which it is to be levied.

"It shall be lawful for the General Assembly, at any future session thereof, without the consent of Congress, to change, alter, or amend this act: Provided, that the same shall not be so changed, altered, or amended, as to reduce or increase the rates of toll hereby established below or above, &c." So that the objects exempted from toll by the second proviso, are, for that reason, out of the operation of the 15th section. There may, it is true, be some inconsistency in the apparent ends and objects of the first proviso in the 4th and the proviso in the 15th section—the one implying that the objects subject to toll might, and the other that they might not, be thereafter extended. Yet both are inconsistent with the supposition that toll might be levied on the objects exempted in the second proviso. But it is still more important that the chief

end and purpose of the contract would be frustrated and
*727] destroyed by allowing Ohio to repeal that proviso.
*But if Ohio had a right to change and alter that proviso, and if it were so changed by the act of February 24th, 1837, it is restored by the 24th section of the act of March 19th, 1838. That act empowers the Board of Public Works to revise the rate of tolls on the National road, and to modify the same so as to raise and collect, in the most equable manner, the sum necessary to defray expenses, &c., "according to the true intent and meaning of the act of February, 1831." And the Board of Public Works, by virtue of the power so vested in them, charged the toll which is the subject of this suit; so that at last the case rests upon "the true intent and meaning of the act of February 4th, 1831," just as it stood when it was adopted by Congress, and became a contract between the United States and Ohio.

2. I contend that the levy of the toll, which is the subject of this suit, was a violation of that contract.

Nominally, and in express words, by the statute of March 19th, 1838, the second mail-coach, as well as the first, is permitted to pass toll free; but toll is charged against the proprietor of such coach for the passengers which are carried in it. Now, no toll is charged to persons who pass the gates, unless they pass in a mail-coach. Out of the mail-coach they go free—in it, toll is charged upon them against the proprietor, because he owns the mail-coach; or, in other words, toll is charged upon the mail-coach to the amount of ten cents for each passengers which it carries.

Now, it cannot for a moment be contended that, under this contract, (if it be a contract,) and within its spirit, either the horses drawing the mail-coach, or the person driving it can be charged with toll. It would be a mere evasion to contract that the mail should pass toll free, and yet charge toll on its necessary incidents. I think it would be equally so, though not at first view so striking, to charge toll on that which was its uniform incident at the time of the contract, because not absolutely indispensable to its passage. Thus it is with the transportation of passengers. The agreed case shows that, at the time of the contract, and before and since, it has been the uniform practice to carry passengers in the mail-coaches.

It must be presumed that the contract was made with a view to that practice; and in stipulating that the mail-coaches should pass free of toll, that both parties intended they should so pass with their usual incidents—horses, coachmen, guards, passengers. If not with all, with what part? It will be

answered, that only which is necessary. But the question recurs, how far necessary, and who is to determine the necessity which will bring the case within the spirit of the contract? Horses are necessary, but how many? Persons to conduct the coach and protect the mail, but how many of them? May you take an agent or guard free of toll? The necessity for each of these is in the same degree with the necessity of passengers—both tend to the security of the mail; but it is possible that it may *go safely without either, and both or neither should be exempt from toll. [*728

Such was clearly the understanding at, and long after, the date of the contract. The agreed case shows that Ohio permitted and still permits, one daily line of mail-coaches to go, with its passengers, toll free. There was, therefore, a perfect understanding as to what was carried, and should continue to be carried, in the mail-coach, and partake of its exemption. But the state now claims to limit this exemption to the passengers in one daily line of mail-coaches, and to charge toll on those transported in the second daily line. I think there is nothing to warrant this limitation. It is true, that at the time of making the contract the mail was carried in one daily line of coaches, but there is nothing in the contract to limit it to that; but, on the contrary, it must have been within the contemplation of the parties that the number of lines should be increased according to the wants of the country, and the convenience of the department. This, also, seems to be admitted; for the second line of coaches is permitted to pass toll free, if it carry no passengers. Now, if the first line of coaches has a right, under the contract, to carry its passengers toll free, and if the second line has a right to pass toll free, no toll can be charged upon it for its passengers, for they are just as much the usual and well understood incident of a second, as of a first line of mail-coaches. Toll, therefore, can be charged upon them only where the mail is put into more than one line of coaches wrongfully, for the purpose of avoiding the payment of toll. We show that such is not the case here.

8. But I contend, also, that the coach carrying the United States mail, upon a post road established by law, is a matter over which a state has no power or sovereignty, and which it cannot by law burden with any toll or imposition whatsoever. It is another question, how a road, which is the property of a state, is to be made a post road; but when it once is so, and fairly the property of the United States, as this road was, and is to that extent and for that purpose, the state has no power to interfere with, lay burdens upon, or prescribe the manner of its use. The mail is transported under a law of Congress, by

contracts made with the postmaster-general. For the convenience of the public and the security of the mails, he requires it to be carried in coaches adapted to the transportation of passengers, and the contracts could not be executed according to their spirit, and with due regard to the safety of the mails, should the contractor fail to provide for the transportation of passengers. The compensation paid for carrying the mail is fixed with a view to these duties and conditions, and any tax or toll levied on a contractor on account of passengers, by so much lessens his compensation, or it compels the department to increase it to an equivalent amount. Nay, if such toll may be levied, it enables a state, at pleasure, to prohibit the trans-
*729] portation of passengers in all mail-coaches, and *thus take away its greatest safeguard. In like manner, the state might tax, at its toll-gates, even to prohibition, a guard passing upon and with the coach carrying the mail. This case, as I view it, falls within the reasoning of the court in *Dobbins* v. *The Commissioners of Erie county*, 16 Pet., 448, 450.

The transportation of the United States mail is a substantive power in Congress, to which the establishment of post-roads, though specially granted by the Constitution, is but an incident; for it can be only with a view to the transportation of the mail that Congress could use the power to establish post-roads, and the passage of the mail in the coach along the post-road, with the horses which move it, and the drivers who guide, and the passengers, or guards who protect it from violation, are, to borrow the language of the court, in *McCulloch* v. *Maryland*, which is repeated by Chief Justice Marshall, in *Weston* v. *The City of Charleston*, 2 Pet., 46, "those means which are employed by Congress to carry into execution the power conferred on that body by the people of the United States," and "the attempt to use the power of taxation," or the levying of tolls "on the means employed by the government of the union in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give;" for "the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.

The right to tax these contracts for the transportation of the mail must operate upon the contractors before they make their bids, and thus have a sensible effect upon the contracts. If this power be allowed to exist at all, in this case, "its extent depends upon the will of a distinct government. It may be carried to an extent which will arrest them entirely."

Swayne's argument was as follows:

Before proceeding to the discussion of the question arising in the case, I respectfully submit to the consideration of the court the following preliminary points:

1. The act of the legislature of Ohio, of February 4, 1831, which lies at the bottom of this controversy, and upon which it must be determined, is a local state law, and, being such, this court, in giving it a construction, will follow the decisions of the highest judicial tribunal of that state. *McKean* v. *DeLancy's Lessee*, 5 Cranch, 32; *Polk's Lessee* v. *Wendall*, 9 Id., 87; *Mutual Ass. Society* v. *Watts*, 1 Wheat., 279; *Shipp et al.* v. *Miller's heirs*, 2 Id., 316; *Gardner* v. *Collins*, 2 Pet., 58; *U. S.* v. *Morrison*, 4 Id., 127; *Anderson et al.* v. *Griffin*, 5 Id., 151.

"We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty *to depart from that construction than to depart from the words of the statute. On this principle, the construction given by this court to the Constitution and laws of the United States, is received by all as the true construction; and on the same principle, the construction given by the courts of the several states to the legislative acts of those states, is received as true, unless it conflict with the Constitution, laws or treaties of the United States." [*730

"This course is founded upon the principle supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government." *Elmendorf* v. *Taylor et al.*, 10 Wheat., 152.

"Nor is it questionable that a fixed and received construction of their respective laws in their own courts, makes in fact a part of the statute law of the country, however we may doubt the propriety of that construction." *Shelby et al.* v. *Guy*, 11 Wheat., 361.

2. If there be doubt in the minds of the court as to the proper construction of the legislative act of 1831, that doubt will be so resolved as to sustain the claim of the defendant in error.

"The presumption must always be in favor of the validity of laws, if the contrary is not clearly demonstrated." *Cooper* v. *Telfair*, 4 Dall., 14.

If the first of these points be sustained, it determines this case. This identical question has been twice decided by the highest court of judicature of the state, in favor of the defendant in error. The first of these decisions was made in 1835, by the Supreme Court of the state, sitting in bank,

(*The State of Ohio* v. *Neil & Moore*, 7 Ohio, 132;) the second, by the Supreme Court in this case.

Why is this point not tenable? It is true, Congress assented to the act of the legislature; but that assent was given without limit or qualification. It does not make the act any the less "the act of the legislature of a particular state"—nor does it in any wise change the principles upon which it is to be construed. I am unable to perceive any reason why its construction should not be determined by the same lights which are applied in this court to other state enactments; and I think it may be safely affirmed that every argument advanced in the authorities cited, to sustain the principle which they decide, applies with undiminished force in this case.

If in this I err; if these two solemn decisions of the highest judicial tribunal of the state have not settled the question, then I rely upon the merits of the case.

Before considering them, it is proper briefly to advert to the circumstances under which the road was ceded by the United States to the state of Ohio.

"In the construction of the statutory or local laws of a state, it is frequently necessary to recur to the history and situation of the country, in order to ascertain the reason as *731] well as the meaning of *many of the provisions in them, to enable a court to apply with propriety the different rules of construing statutes." *Preston* v. *Browder*, 1 Wheat., 115.

At the time of the passage of the act of the legislature, of 1831, a considerable part of the road in Ohio had been finished and in use some time. It was rapidly going to ruin. The general government made no appropriations, and took no other step to keep it in repair. There was no prospect of any such provision being made. The same course had been pursued in regard to the road east of the Ohio river, and large sections of it were nearly impassable. Under these circumstances, the state of Ohio came forward and proposed to take charge of the road within her limits, and keep it in repair upon the terms specified in the act referred to. Congress immediately assented, and the state thereupon took charge of the road. This act provided for a loan of money to the road fund. Such loans have been frequently made since for repairs; and notwithstanding that the tolls have been repeatedly extended and enlarged, both as to objects and rates, the road is at this time largely in debt, and yet needs constant and large repairs. With all the tolls now levied upon it, inclnding the important item in controversy in this suit, the road is a heavy burden to the state, and has required, and still

requires unremitted vigilance and effort to prevent it from becoming an entire ruin.

Treating the question under consideration as an open one, I lay down two propositions:

1st. That the state has as broad a right to levy and collect tolls upon this road, as if it had been constructed by her, without the United States having been in any wise connected with it; subject, however, to this perpetual and only restriction—that the whole amount collected shall be neither more nor less than sufficient to meet the costs and charges, direct and incidental, of keeping the road in repair.

2d. That the levying of toll upon passengers conveyed in mail-coaches is not in conflict with the proviso in the 4th section of the act of 1831—"that no toll shall be collected for the passage of any stage or coach conveying the United States mail, or horses bearing the same."

If the first of these propositions be sound, the second is not material in this case. I rely, however, confidently upon both.

1. As to the first proposition.

It has been shown already that Congress consented unqualifiedly to all the provisions of the act of the legislature of February 4, 1831.

For the sake of clearness and continuity of view, at the hazard of being tedious, I will here again quote the 15th section of that act. It is the turning point of this case.

"Sect. 15. That it shall be lawful for the General Assembly at any future session thereof, without the assent of Congress, to change, *alter, or amend this act, provided the same [*732 shall not be so changed, altered or amended, as to reduce or increase the rates of toll hereby established, below or above a sum necessary to defray the expenses incident to the preservation and repair of said road, to the erection of gates and toll-houses thereon, and for the payment of the fees or salaries of the superintendent, the collectors of tolls, and of such other agents as may be necessarily employed in the preservation and repair of the same, according to the true intent and meaning of this act."

First. The power "to change, alter, or amend," is given in the broadest language. What is the restriction? Simply that "the rates of toll" thereby established, shall not be reduced or increased "below or above a sum necessary" for the preservation and repair of the road. This is the only restriction upon the power of the state. The object of both parties was to preserve the road. Congress asked no guaranty beyond this, and the state gave none. To secure the preservation of the road, and at the same time to get rid of

the burden, was the inducement to the general government. To prevent the destruction of the road, and to provide the means of preserving it, from the road itself, was the purpose of the state.

Such being the only restriction upon the power of the state, whenever any act is done by her, the validity of which is questioned, the true mode of arriving at a sound conclusion, is to inquire whether it is within this restriction. If it be not, however unwise or impolitic it may be, it is as valid as any other act of the state.

Since the passage of the act of 1831, various objects, not enumerated in it, have been subjected to toll; but it is admitted in the agreed facts, that the "rates" of all the tolls are neither above nor below the sum prescribed in the act. Passengers in one of the lines of mail-coaches are a part of these objects. Are they within this restriction? Suppose the stages and horses carrying the mail had in like manner been embraced in these objects, and subjected to toll, as upon other turnpike roads; how could they be said to be within a restriction, which does not allude to them in the most distant manner, and which relates to a wholly different subject?

It may possibly be contended that the proviso in this section is confined to the rates of toll upon the objects enumerated *in* that act. If it be so, it is immaterial in this case. The tolls in that act have been repeatedly increased, but never reduced. If this construction be adopted, then the agreed fact, that all the tolls (including those upon new objects) are neither "below nor above" the sum required to be collected, is an immaterial matter. Whichever construction be adopted, it is clear that levying toll upon an object not subjected to toll by *the* act of 1831, is not within this restriction.

The literal meaning of this proviso may possibly be as suggested, but a few words will be sufficient to show that such is not the proper construction. If it were, this absurd conse-
*733] quence would follow; *the state may raise the tolls upon the objects specified in the act so high as to yield a sum sufficient to keep the road in repair: and in addition, levy any amount of tolls upon other objects, and apply it to other purposes.

To insist upon such a construction, would be about as rational as for the defendant in error to contend, that coaches carrying a part of the mail are not within the terms and meaning of the clause exempting from toll coaches carrying the mail.

If we look beyond the letter of the proviso to the context of the act, no doubt can remain as to its true meaning.

Either construction, however, affects the defendant in error alike, and suits equally with the views here presented.

After this examination of the subject, can it be doubted, that it was the intention of both parties, when the acts of 1831 were passed, that the state should have all the power claimed for it in this proposition, subject only to the restriction mentioned.

Second. The act of February 4, 1831, contains a proviso, at the end of the 1st section, and two at the close of the 4th section, to which, in connection, I desire to call the attention of the court.

The first provides that the number of gates on the road shall not exceed one for every twenty miles.

The second exempts from toll, persons passing to or from public worship; or, to or from musters; or, to or from their common business on their farms or woodlands; or, to or from a funeral; or, to or from a mill; or, to or from their common places of trading, or market, including their carriages and horses, or oxen drawing the same.

The third exempts from toll, any stage or coach conveying the mail of the United States, and the horses drawing the same; any wagon or carriage laden with the property of the United States; any cavalry or other troops of the United States; arms or military stores belonging to the United States; arms or military stores belonging to any of the states, or to any person on duty in the military service of the United States, or of the militia of any of the states.

All these provisos stand upon the same footing. They are alike obligatory as to duration and inviolability.

If the state can "alter, amend, or change" any of them, she can all. She can abrogate all or none. All or none were intended to be perpetual and unalterable.

The state has found it necessary, besides increasing the rates of toll, to increase the number of gates. There are gates now every ten miles, and, in some instances, "half gates" at the end of five miles.

She has abrogated the exemption from toll in favor of those going to mill, market, and their common places of trading.

She has abrogated nearly all the other exemptions.

That in favor of mail-coaches and horses is one of the few left.

*Was it a violation of the act of 1831 to erect these gates, and abrogate these exemptions? Was it within the restriction contained in the 15th section? [*734

Have not all those passing the additional gates, and all those going to mill, market, or their usual places of trading,

much more ground for complaint than the plaintiffs in error? Can they resist the payment of the new tolls imposed upon them?

If the state had a right to make these changes in the act of 1831, and to abrogate these exemptions, has she not the same right to abrogate the remaining exemption as to mail-coaches, whenever she may think proper to do so? Wherein lies the difference, and how are the cases distinguished?

It will be observed that these exemptions contain no words of perpetuity.

The part of the statute which contains them is separated from the part containing the power to alter and amend and restricting it, by ten intervening sections, which are wholly silent upon the subject.

If it had been the intention of the legislature that this exemption as to mail-coaches and horses should be perpetual, would there not have been added, at the end of the 15th section, after the other perpetual restriction which it contains, a clause like this:

"And provided also, That no toll shall ever be collected from any stage-coach carrying the mail of the United States, nor from the horses drawing the same."

Nothing of this kind is to be found in any part of the act.

I think these views fully sustain the first proposition.

2. As to the second proposition.

The ground upon which the plaintiffs in error mainly rely, is, I understand, that passengers conveyed in coaches carrying the mails are within the proviso of the fourth section of the act of 1831, which exempts the coach and horses from toll, and consequently that such passengers are exempted also.

If this were so, I think I have shown, that it was in the power of the legislature at any time to abrogate all or any part of this exemption, and if it were necessary, I might safely contend that as respects such passengers, the legislature has done so.

But I rely confidently upon the proposition, that such passengers are not within this exemption.

In the year 1835, the Supreme Court of Ohio, in bank, in a case between the same parties, (adverted to elsewhere in this argument in another connection,) delivered the following unanimous judgment upon this point:

"First, then, is the act of the General Assembly imposing this toll, unconstitutional? Or, in other words, is it a tax on the coach itself, calculated in its consequences to impede or obstruct the conveyance of the United States mail? We hold the negative. The coach, the horses, the drivers, and

the proprietors are exempted in *express terms. But it is said that contracts for the transportation of the mail were made in reference to the conveyance of passengers. Such may have been the case. The postmaster-general is not authorized, however, to make any contract exempting passengers, either in coaches, or on foot, from the payment of toll. His contracts can extend only to the mail, and the mode of its conveyance. The defendants have the right to the road secured to them by the acts of Congress, and of the Assembly, free from toll, for such carriages, horses, and attendants, as may be necessary to enable them fully to comply with their contracts; but when they attempt to go beyond this, and resort to means to increase their profits, not necessarily connected with their contracts, they, like others, are rightfully subjected to the inconvenience of paying the toll, which the convenience of a good road imposes.

"The proposition cannot, we think, be maintained, that passengers are necessary for the conveyance of the mail, and if they are not, a tax on them is, in no light in which the subject can be viewed, a tax on the coach itself, nor calculated, in its consequences, to impede or obstruct the transportation of the mail." *State of Ohio* v. *Neil & Moore*, 7 Ohio, 133.

This opinion was adhered to and deliberately affirmed in the case at bar. The reasoning of the court seems to me to be conclusive. It covers the whole ground of the objections urged by the plaintiffs in error. Further discussion can add little to its force. I should not fear to rest this part of the case entirely upon it. The proposition which it maintains, however assailed, requires, I think, little effort to support it. It seems to me to be such, as almost to present one of those cases, in which "the truth is discoverable by its own light, without the aid of argument."

This toll is levied, not upon the plaintiffs in error, but upon the passengers conveyed in their coaches. If those from whom it is exacted pay it, surely it is no burden upon those who convey them. The latter are not compelled to pay it, unless they assume it. Stripped of all circumlocution, the language of the plaintiffs in error is, in effect, this: Allow us to receive this toll, instead of the state, and the mail will be carried at less cost to the Post-office Department. The same reasoning upon which they rely, would apply equally to every thing else they may choose to carry in their mail-coaches, or indeed, in any other vehicle in which they may carry a part of the mail, with the sanction of the postmaster-general. The answer is, that the general government has not asked, and that the state had not conceded, any such exemption. I do not see but that

the same argument would apply with equal force to any other toll collected on the road. Give to the plaintiffs in error any other toll, and undoubtedly they would carry the mail at so much less cost to the government.—The circle of this argu-
*736] ment is wide enough to include every toll levied upon the road. If we depart *from the construction of this exemption, contended for by the defendant in error, where shall the departure be limited?

Another act of the legislature of Ohio provides, that "all boats" belonging to the United States "shall be permitted to navigate either of the canals of this state, free from the payment of tolls." 38 Ohio Laws, 87. Does this exemption of the boat from toll, exempt from toll also the lading upon it belonging to private individuals? If the exemption of the coach exempts the passengers, why does not the exemption of the boat also exempt the lading?

Before and at the time of the passage of the act of 1831, it was no more "usual" to convey passengers in mail-coaches on the National road, than it was before and at the time of the passage of this law, to transport lading in boats upon the canal. "If not necessary, it is useful" in the same manner. Were the boat removed, by contract, from point to point upon the canal, the exemption of the lading would as much lessen the cost of the removal of the boat, as the exemption of the passengers would lessen the cost of the transportation of the mail. Were the boat a mail-boat, the exemption of the lading would be much more important to the United States than the exemption of passengers as claimed in this case. Lading is as closely associated with the idea of a boat upon the canal, as passengers are with that of a mail-coach on the National road. The term boat as much includes lading, as the term mail-coach does passengers. I am aware of no argument applicable to one, that does not apply equally to the other. In my apprehension the parallel is perfect.

To insist seriously that the exemption of the boat exempts the lading, would probably be deemed by all a gross absurdity. Does not this claim of the plaintiffs in error, by the clearest analogy, embrace that case and lead to this result?

A proposition leading to a consequence so absurd, must, itself, necessarily be unsound.

It will be observed that the decision of the Supreme Court in 1835 was made before the plaintiffs in error entered into the contract with the postmaster-general, which was in existence when this cause of action arose. That contract was made, and this liability incurred, of course, with full knowledge of that decision.

It will also be observed that the objection to the toll in question does not come from the general government, which is said to be aggrieved, nor from those upon whom the toll is laid, but from the mail contractors, who have voluntarily assumed a vicarious responsibility for their passengers, and patriotically seek in this suit, unbidden, to vindicate the violated rights of the United States.

Upon what consideration this is done, it is not material to inquire.

Since the foregoing was written, I have seen the argument of the plaintiffs in error. It renders a few additional remarks necessary.

*It is not denied that it was within the power of Congress to surrender the road to the state upon any [*737 terms that might be agreed upon. The whole question is, What were the terms? They are to be found in the 15th section of the act of 1831. There is the "contract." The power to "alter, change, and amend," is, (as before remarked,) unlimited by "any qualification," except as to the amount to be collected. Mr. *Ewing's* argument would change the contract, and impose a condition which is contrary both to the terms and implication of the agreement. In order to warrant his construction of this act, it would be necessary (as suggested in the preceding argument) to "dislocate" the proviso upon which he relies from its place in the 4th section, and, thrusting it over the ten intervening sections, interpolate it as a second proviso at the end of the 15th section. Otherwise, it is clear that the construction for which he contends is both grammatically and logically incorrect. It is only by confusing these provisos together, and losing sight of their different and relative places in the context, that any doubt can arise on this point.

It is admitted that it was competent for the state to abrogate all the exemptions contained in the 4th section, except that relating to mail-coaches. The distinction attempted to be established between that and those which precede it, is unwarranted by any principle of construction with which I am acquainted. They stand upon the same footing, and are all alike alterable or unalterable.

When the act of 1831 was passed, the legislature obviously believed that the road, with all the exemptions specified in the 4th section, would yield a sum sufficient for its preservation. But as the experiment was an untried one, the state was willing to bind herself by no restriction whatever, but that the sum collected should be neither more nor less than suffi

cient to keep the road in repair. Her experience has shown the wisdom of this caution.

The act of February 6th, 1837, imposes a toll at each gate, of three cents, upon the passengers in question. The act of March 19th, 1838, authorizes the Board of Public Works to "revise" the rates of all the tolls—"to be paid by persons passing on, or using, the National road." In the exercise of this power the board has raised the toll in controversy from three to ten cents. It is admitted that they have not transcended the limitation contained in the 15th section of the act of 1831. Their action, then, is "according to the true intent and meaning of the act of February 4th, 1831." The legislature used the language just quoted in the act of 1838, obviously with a view to the restriction contained in the 15th section of the act of 1831, and not, as intimated in the argument of the plaintiff in error, for the purpose of submitting the question to the board, as an open one—whether the act of 1831 permitted such a toll to be exacted. That question had been determined by both the legislature and the Supreme Court. The duty devolved upon the board *738] *was, to "revise," upon the principles indicated, the pre-existing tolls.

It is said that the state still exempts from toll the two lines of mail-coaches, and the passengers conveyed in one of them.

This is true; and the exemption is practically larger and more injurious to the fund arising from the road, than it was when the act of 1831 took effect. Then, the exemption was confined to one line of coaches and the passengers conveyed in it. How long the state will be able to continue this exemption in its present extent, will depend upon the amount of expenditure necessary to keep the road in repair. She is bound by her contract with the United States to collect this amount. The sum constantly increases as the road becomes more worn. Her forbearance during the few years which has elapsed since she took charge of the road, can surely afford no argument against any right to which she is entitled under a fair construction of the act of cession.

It is said, also, that this road "is a post road established by law."

Admitting this to be so, in my view of the subject it does not affect the question under consideration. But the assumption is erroneous. Congress has designated the points where post-offices shall be established, and directed the mail to be conveyed to them; but the road is not specified upon which it shall be conveyed. This, then, is no more "a post road established by law," than any other road over which the

mail is carried. Indeed, the power to establish post roads, it is said, has never been exercised by Congress in any instance. 3 Story Const., 43.

Whenever this power shall be exercised either as respects state roads already existing, or those to be constructed for that purpose by the general government, a host of new and most difficult questions will at once arise between the several states and the United States. A glance at the learned work referred to will show them. It is unnecessary to consider any of them here.

This not being a post road established by law, the argument founded upon that assumption falls to the ground.

It may, however, be contended, that this and all other roads upon which the mail is conveyed, are established as post roads by necessary implication from the acts of Congress establishing post-offices upon them, and directing the mail to be conveyed to such offices.

If so, the answer is obvious. If the United States buy in the property of a debtor in satisfaction of a judgment, such property is still liable to taxation by the state. A branch of the Bank of the United States was not liable to be taxed, but the real estate held by the bank, which the branch occupied, was so liable.

It has never been questioned that the coaches and horses belonging to the contractor, which he uses in the transportation of the mail, are liable to taxation by the state, like all other individual property, *and if the contractor [*739 convey the mail upon a turnpike on which tolls are collected, he is liable to the same tolls as other persons. The power to levy such taxes and collect such tolls, is within the exceptions distinctly recognized in all the cases decided by this court in which this subject has been considered. 4 Wheat., 316; 9 Id., 867; 12 Id., 136; 2 Pet., 46; 16 Id., 442.

The argument upon the other side is broad enough to maintain the proposition, that such coaches and horses are exempted both from taxation and toll.

Whenever the general government uses the instrumentality of private means to effect its objects, such means are liable to taxation or toll, as the case may be, to the same extent as if they were employed in the business of private individuals. This reasoning applies as much to this road as to any other; and the case must necessarily turn upon other points.

It is strenuously contended, that the exemption of the coaches and horses from toll, exempts also the passengers as an "incident."

It will be readily perceived by the court, that if the argu

ment of the defendant in error fail on all the other points, yet, "unless the plaintiff in error succeed in maintaining this proposition, the judgment below must be affirmed."

If my recollection serves me correctly, it is not many years since the transportation of passengers in the mail lines, on the great routes, was greatly restricted, if not entirely prohibited, by the head of the Post-Office Department. Does he contract for the conveyance of passengers? Is that a matter about which the government concerns itself? The letter of the postmaster-general in this case sets up no such claim as is insisted upon by the plaintiff in error, and manifests no interest in the subject.

It has been held by this court, that a branch of the Bank of the United States was not liable to taxation by a state, but that the stock in the bank, held by a citizen of the state, was. 4 Wheat., 316. Was not the argument for the exemption of the stock in that case much stronger than the argument for the exemption of the passengers here? The analogy is too obvious to need comment. If the right claimed to collect toll from passengers be sustained, it is apprehended that "the state might tax at its toll-gates, even to prohibition, a guard passing upon a coach carrying the mail." The connection between the mail and the coach, horses, driver, and guard, is certainly very different from that which subsists between the mail and the passengers. No right has been asserted by the legislature to collect toll from the proper incidents of the mail upon this road. When such a case shall occur, it will be early enough to adjudicate upon it. The question in this case is a very different one. It relates solely to passengers.

For a fuller examination of this point, I refer to the preceding argument.

*740] **Ewing*, in reply.

I have said in the opening argument, that the National road in Ohio was, at the time of the transfer to that state, and still is, a post road. This is denied by Mr. *Swayne*.

Acts of Congress, passed every four years since its construction, direct that the mail shall be carried daily from town to town, (as from Wheeling to Zanesville, and thence to Columbus,) which towns are upon the National road. The agreed case shows that the mail was so carried upon said road ever since its construction. The usage applying the law to this road, and the subsequent laws coinciding with the usage, the reservation in the contract of the right to transport the mail along the road, and its subsequent continued transporta-

tion, make it, I contend, as fully a post road, as if it had been expressly declared so by act of Congress.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case has arisen out of two acts of Assembly, passed by the legislature of Ohio, one in 1837, and the other in 1838, and an order of the Board of Public Works of that state, whereby a toll has been imposed upon passengers travelling in the mail-stage on the Cumberland road.

We have already, at the present term, fully expressed the opinion of this court, in relation to the compacts between the United States and the states of Ohio, Pennsylvania, Maryland, and Virginia, concerning this road, and the rules by which they ought to be interpreted. It is only necessary, therefore, on this occasion, to apply the principles there stated to the case before us.

The material parts of the laws in question are the 4th section of the act of 1837, and the 24th section of the act of 1838. The first imposes a toll of three cents on every passenger in the mail-stage, at each toll-gate; and the second authorizes the Board of Public Works to revise and modify the rates of toll to be paid by persons using the road; and in pursuance of this authority the board passed an order raising the toll on each passenger in the mail-stage to ten cents. But no toll is charged, either by the law or the order of the board, upon persons travelling in any other carriage.

The 4th section of the act of 1831, whereby the state of Ohio proposed, with the assent of Congress, to take charge of the road and keep it in repair, contains a specific enumeration of the tolls she intended to charge upon carriages of every description, and other property; and after making this enumeration, the section concludes with the following proviso: "That no toll should be received or collected for the passage of any stage or coach conveying the United States mail, or horses bearing the same, or any wagon or carriage laden with the property of the United States, or any cavalry or other troops, arms or military stores belonging to the same or to any of the states comprising this union, or any person or persons on duty *in the military service of the United [*741
States, or of the militia of any of the states."

We shall hereafter speak of the 15th section of this act, which has been supposed to justify the toll in question. But, subject to the modifications, if any, authorized by that section, the entire contract in relation to the tolls, offered by the state and accepted by Congress, is to be found in the 4th; the resi-

due of the act containing nothing more than detailed regulations for the collection and application of the tolls.

At the time this compact was made, it was well known that the mail was always transported by contractors, and that whenever it was conveyed in carriages, the vehicles belonged to them, and were their own private property, and not the property of the United States. It was equally well known that upon this road, as well as many others, the postmaster-general, in his contracts, uniformly required that the mail should be carried in a stage or coach capable of accommodating a certain number of passengers, the presence of the passengers being regarded as adding to the safety of the mail, and superseding the necessity of any other guard.

This mode of transporting the mail must have been perfectly known to the state in 1831, when the agreement was made; and in providing for the exemption of carriages conveying the United States mail, both parties must have intended to exempt the vehicles usually employed in that service; and that carriages belonging to the contractors, although carrying passengers, were to pay no toll, while all other vehicles were to be charged at the rate specified in the law. The reason of this exemption is evident; for a toll charged upon the carriages of the contractor would, in effect, be a charge upon the Post-office Department, since the contractor would be obliged to make provision for this expense when bidding for the contract, and regulate his bid so as to cover it.

In the proposition made by Ohio, nothing was said of a toll on the passengers in a carriage of any kind, but the charge is made upon the carriage itself, according to its description, and the number of horses, without any regard to the number of persons that may be travelling in it; and it is evident that it was at that time supposed that the rates specified and agreed on would prove sufficient to keep the road in repair, and that the United States would always thereafter have the free use of it, for mail-carriages of the usual kind, without any burden upon them, direct or indirect.

If the expectations of the parties had been realized, and the tolls mentioned in the law had produced revenue enough to preserve the road, no one, we think, would have supposed that tolls could be collected from passengers in the mail-stage, or that the specified charges upon the carriages could have been reduced, and the deficiency supplied by a toll upon persons travelling in the carriages which conveyed the mail.

*742] * In the case of *Searight* v. *Stokes and others*, we have already said, that with an agreement like this before us between the United States and a state, we must look at the

relation in which the parties stood to one another, as well as to the subject-matter of the contract, and the object which the high contracting parties intended to attain; and we must expound it upon principles of justice, so as to accomplish the purposes for which it was made, and not defeat their manifest intention, by a narrow and literal interpretation of its words. And regarding it in this point of view, we think it very clear that no part of the burden of supporting this road was intended to be levied upon the United States, but was to be obtained altogether from other sources; and that the relative position and privileges of the mail-coaches in regard to tolls, as prescribed in the law, were to be always afterwards maintained, unless a deficiency or superabundance of revenue should render it necessary to increase or diminish the rates fixed in the law. For if this were not the case, the whole detailed and particular provision in relation to the things to be charged, and the rates to be imposed, as set forth in the law of Ohio, and so cautiously recited in the act of Congress consenting to the surrender of the road, would be nugatory and without an object. On the other hand, this mode of proceeding was the natural and proper one, where two sovereignties were contracting with each other by means of legislative action; and it was obviously adopted by the parties in this instance in order to show the terms proffered by Ohio, and assented to by Congress, and forms the conditions of the compact between them, so far as their respective rights were concerned.

We proceed to apply these principles to the question before us. The law of the state, and the order of its Board of Public Works, impose a toll upon every one travelling in the mail-stage, while the passengers in [illegible] the road [illegible] in the mail-to go free. If this can be done, it is manifest that the United States will derive [illegible] every other vehicle are allowed from enjoying [illegible] to be done, it is manifest that the United which they leave the [illegible] no benefit from the compact, and so far large por[illegible] a toll [illegible] the privilege for which they stipulated, and for them. [illegible] charge travel paid so heavily in the construction of the road, a the [illegible] sively [illegible] tion of the burden of repairs will be thrown upon by been [illegible] This is strikingly illustrated by comparing the toll t[illegible] pri[illegible]ed upon coaches similar to those employed in conveying [illegible]e a[illegible]ed mails, with the toll indirectly levied upon the mail-stage, relat[illegible] mails, with the toll indirectly levied upon the mail-stage, coac[illegible] a charge upon its passengers. According to the rates contained in the law of which we are speaking, a four-wheel carriage, drawn by four horses, pays at each gate thirty-one and a quarter cents, and if it is not conveying the mail, it pays nothing on its passengers. This sum is therefore the whole amount of the toll to which it is liable. Now the mails on this road have, we understand, been always transported in

due of the act containing nothing more than detailed regulations for the collection and application of the tolls.

At the time this compact was made, it was well known that the mail was always transported by contractors, and that whenever it was conveyed in carriages, the vehicles belonged to them, and were their own private property, and not the property of the United States. It was equally well known that upon this road, as well as many others, the postmaster-general, in his contracts, uniformly required that the mail should be carried in a stage or coach capable of accommodating a certain number of passengers, the presence of the passengers being regarded as adding to the safety of the mail, and superseding the necessity of any other guard.

This mode of transporting the mail must have been perfectly known to the state in 1831, when the agreement was made; and in providing for the exemption of carriages conveying the United States mail, both parties must have intended to exempt the vehicles usually employed in that service; and that carriages belonging to the contractors, although carrying passengers, were to pay no toll, while all other vehicles were to be charged at the rate specified in the law. The reason of this exemption is evident; for a toll charged upon the carriages of the contractor would, in effect, be a charge upon the Post-office Department, since the contractor would be obliged to make provision for this expense when bidding for the contract, and regulate his bid so as to cover it.

In the proposition made by Ohio, nothing was said of a toll on the passengers in a carriage of any kind, but the charge is made upon the carriage itself, according to its description, and the number of horses, without any regard to the number of persons that may be travelling in it; and it is evident that it was at that time supposed that the rates specified and agreed on would prove sufficient to keep the road in repair, and that the United States would always thereafter have the free use of it, for mail-carriages of the usual kind, without any burden upon them, direct or indirect.

If the expectations of the parties had been realized, and the tolls mentioned in the law had produced revenue enough to preserve the road, no one, we think, would have supposed that tolls could be collected from passengers in the mail-stage, or that the specified charges upon the carriages could have been reduced, and the deficiency supplied by a toll upon persons travelling in the carriages which conveyed the mail.

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relation in which the parties stood to one another, as well as to the subject-matter of the contract, and the object which the high contracting parties intended to attain; and we must expound it upon principles of justice, so as to accomplish the purposes for which it was made, and not defeat their manifest intention, by a narrow and literal interpretation of its words. And regarding it in this point of view, we think it very clear that no part of the burden of supporting this road was intended to be levied upon the United States, but was to be obtained altogether from other sources; and that the relative position and privileges of the mail-coaches in regard to tolls, as prescribed in the law, were to be always afterwards maintained, unless a deficiency or superabundance of revenue should render it necessary to increase or diminish the rates fixed in the law. For if this were not the case, the whole detailed and particular provision in relation to the things to be charged, and the rates to be imposed, as set forth in the law of Ohio, and so cautiously recited in the act of Congress consenting to the surrender of the road, would be nugatory and without an object. On the other hand, this mode of proceeding was the natural and proper one, where two sovereignties were contracting with each other by means of legislative action; and it was obviously adopted by the parties in this instance in order to show the terms proffered by Ohio, and assented to by Congress, and forms the conditions of the compact between them, so far as their respective rights were concerned.

We proceed to apply these principles to the question before us. The law of the state, and the order of its Board of Public Works, impose a toll upon every one travelling in the mail-stage, while the passengers in every other vehicle are allowed to go free. If this can be done, it is manifest that the United States will derive no benefit from the compact, and so far from enjoying the privilege for which they stipulated, and for which they paid so heavily in the construction of the road, a large portion of the burden of repairs will be thrown upon them. This is strikingly illustrated by comparing the toll charged upon coaches similar to those employed in conveying the mails, with the toll indirectly levied upon the mail-stage, by a charge upon its passengers. According to the rates contained in the law of which we are speaking, a four-wheel carriage, drawn by four horses, pays at each gate thirty-one and a quarter cents, and if it is not conveying the mail, it pays nothing on its passengers. This sum is therefore the whole amount of the toll to which it is liable. Now the mails on this road have, we understand, been always transported in

coaches of the above description, and although under the order of the Board of Public Works, no toll is charged directly upon the carriage, yet every passenger must pay ten
*748] cents at each *gate, so that the carriage of a mail-contractor, containing six passengers, pays nearly double as much as a like carriage owned by any one else with the same number. And what still more strongly marks the disadvantages to which the United States are subjected by this order of the board, these passengers may be persons in the service of the United States, passing along the road in the execution of some public duty, for the order makes no exceptions in their favor. And although this toll, in form, is laid upon the passengers and not upon the vehicle, the result is the same; for in either case it is, in effect, a charge upon the proprietor of the carriage, diminishing his profits in that portion of his business; and when thus levelled exclusively at passengers in the mail-stage, it accomplishes indirectly what evidently cannot be done directly by a toll upon the carriage, and in its consequences must seriously affect the interests of the United States. For in bidding for a contract upon a road so much travelled as this, the bidder would undoubtedly be greatly influenced by the advantages which a contract would give him in the conveyance of passengers, as his carriages, when carrying the mail, are entitled to go free. But if they, and they alone, are to be subjected to this burdensome and unequal toll, it is obvious that he must seek to reimburse himself, by enlarging his demand upon the government. Indeed, if this system of levying toll can be sustained, the mischief may not stop here; and it will be in the power of any one of the states through which the road passes so to graduate the tolls as to drive all passengers from the mail-stages into other lines, and by that means compel the United States, contrary to their wishes, and contrary to the public interest, to transport the mails in vehicles in which no passenger would travel.[1]

Nevertheless we do not mean to deny the right of the state to impose a toll upon passengers in the mail-stages, provided, the power is exercised, in a manner and upon principles, consistent with the spirit and meaning of the argument by which the road was transferred to the care of the states. On the contrary, in the case of *Searight* v. *Stokes* and others, we have already said that such a toll may be lawfully collected. But as no toll on passengers had been proposed by the law of Pennsylvania, the opinion, on that occasion, is expressed in

[1] CITED. *Passenger Cases*, 7 How., 521.

general terms, as to the right; the case then under consideration, not calling upon the court to speak more particularly upon the subject. The Ohio law, however, brings the question directly before us, and makes it necessary to state more fully and precisely the opinion of the court.

The true meaning of the compact we understand to be this. The carriages carrying the mail, with their passengers, travelling in the known and customary manner, were to pass toll free, as well as other vehicles laden with the property of the United States and the persons employed in their service, as mentioned in the proviso hereinbefore recited; and the road was to be kept in repair by the *revenue derived from [*744 the tolls specified in the Ohio law, according to the rates there set forth, provided they should prove to be sufficient for the purpose. No toll was at that time proposed upon passengers in any vehicle, and passengers in the mail-stage therefore had no peculiar privilege in going free, and merely passed along the road upon the same terms with those who were travelling in other carriages. And as the compact contains no stipulation for the exemption of travellers in the mail-stages, the general government can demand no advantages in their behalf, which are not extended to passengers in other vehicles. But they have a right to insist that the equality upon this subject, which the law of Ohio originally proposed, shall still be maintained; that the privilege and advantages intended to be secured to the carriages conveying the mail, over those granted to other vehicles, shall be preserved in substance and reality as well as in form; and that the passengers in the mail-stages shall not be selected and set apart, as the especial objects upon which burdens are to be laid, and to which travellers in other carriages are not to be subjected.

If, therefore, the revenue from the road, according to the rates originally agreed on, was found to be inadequate, then the state had undoubtedly a right to increase the rate on any thing before subject to toll; or might, if it was deemed more advisable, leave the tolls as they stood, and charge in addition to them a toll on passengers. And if instead of selecting the persons travelling in the mail-coaches, and laying the burden exclusively upon them, all passengers in vehicles of any kind had been equally charged, the real and substantial advantages and privileges to which the United States are entitled under the agreement would have been preserved, and the equality in relation to passengers originally existing between the mail-coaches and other carriages would not have been disturbed. And it is in this manner only, in our judgment, and as a toll in addition to that specifically stated in the contract, and im-

posed equally upon passengers in every description of vehicle, that persons travelling in the mail-stages can be lawfully charged, without first obtaining the assent of Congress.

The 15th section of the law of 1831 has been relied on in the argument, as reserving to the state the right to make any alteration it might afterwards think proper without regard to the interest of the general government. It is true that this section begins with a declaration that it shall be lawful for the General Assembly at any future session, without the assent of Congress, to change, alter, or amend the act. But this clause evidently relates to the various provisions made in the law for the collection and disbursement of the money arising from the tolls proposed to be charged. The United States could have no interest in these details, and they were therefore properly retained in the hands of the state. And so in regard to the *745] privilege of passing free on certain occasions, given by the *law, it is undoubtedly in the power of the state, if it thinks proper, to revoke it, since the exemption was a mere voluntary act, founded on no valuable consideration, but growing out of what was then supposed to be a just and liberal policy, which the state could afford to exercise; but which it had the right to change whenever it was deemed necessary to do so. But a full and valuable consideration had been paid by the United States for the privileges reserved to them, and they were a part of the contract which transferred the road to the care of the state. And this being the case, the section in question cannot by any sound rule of construction be regarded as inconsistent with the contract contained in another part of the same law, and as placing the rights secured to one party entirely at the discretion and the control of the other. The reservations of power to the state, evidently relate to subjects in which the general government had no separate interest; and they would have been altogether unnecessary and useless if the state had not considered the preceding part of the law as the proffer of a compact which was to be obligatory upon it, if assented to by Congress.

There is a clause in the law of 1837, which would appear to distinguish between the mail-stages, in relation to toll, where more than one mail passed along the road on the same day. Upon this point it may be proper to say, that, in the opinion of the court, it rests altogether in the discretion of the postmaster-general, where the power has been conferred on him by Congress, to determine at what hours the mail shall leave particular places and arrive at others; and to determine whether it shall leave the same place only once a day or more frequently. Upon this point his decision is absolute, when the

discretion is committed to him by the laws of the United States, and cannot be controlled by a state or by the courts. And in the case of *Searight* v. *Stokes and others*, when the court speak of abuses by the contractors in the number of carriages employed, and of the right of the court to enforce the compact, it will be seen by a reference to the opinion, that it is confined to cases where the mail-bags, directed to leave the post-office at the same time, are unnecessarily divided among a number of carriages in order to evade the payment of toll; and the opinion expressed on that occasion by the court does not apply to stages leaving the post-office with mails at different hours, in obedience to the orders of the department. In the latter case it is immaterial whether the mails are light or heavy. The postmaster-general is, upon this subject, the proper and only judge of what the public interest and convenience requires, and his decision cannot be questioned by the courts.

The provision upon this subject, however, appears to have been intended to guard against abuses by contractors, rather than to interfere with the powers of the postmaster-general. And in regard to the toll imposed, as hereinbefore mentioned, if it is necessary for the support of the road, it is in the power of the parties to the compact *to modify it at [*746 their pleasure, and to give the state the power it has exercised. But according to the terms of the contract, as it was originally made, and still stands, the toll upon passengers in the mail-stages, laid in the manner hereinbefore stated, cannot lawfully be demanded, and the judgment of the state court must therefore be reversed.

Mr. Justice DANIEL.

From the decision just pronounced on behalf of the majority of the court, I am constrained to dissent. Upon the principles involved in the decision, so far as they have been assumed as the foundation of rights in the federal government, or in the postmaster-general as its agent or representative, independently of any agreement with the state of Ohio, my opinion has already been declared. That opinion was expressed on a similar point arising in the case of *Searight* v. *Stokes et al.*, during the present term; it is unnecessary, therefore, on this occasion to repeat it. With respect to the compact which is said to have been made between the federal government and the state of Ohio, by the act of Congress relinquishing the control of the Cumberland road to the state, and by the act of the Ohio legislature, assuming the control and management of that road, it has not to my mind been shown that this compact has

in any respect been violated by the state. A cursory view of the legislation, both by the state and by Congress, will establish the very converse of any such inference. That the several proceedings on the part of the state steer entirely clear of collision with the letter of that compact, has not, so far as I have heard, been even disputed. The statute of Ohio, passed on the 4th of February, 1831, after several provisions—1st, investing the governor of the state with power to take under his care that portion of the Cumberland road comprised within the limits of the state; 2dly, prescribing the rates of toll to be collected; 3dly, laying down regulations for the police of the road; contains in the second proviso of the 4th section the following enactment: "Provided also, that no toll shall be received or collected for the passage of any stage or coach carrying the United States mail, or horses bearing the same, or any wagon or carriage laden with the property of the United States, or any cavalry or other troops, arms or military stores belonging to the same, or to any of the states of the union; or any person or persons on duty in the military service of the United States, &c., &c." The 15th section of the same law is in the following words: "That it shall be lawful for the General Assembly at any future session thereof, without the assent of Congress, to change, alter, or amend this act; provided that the same shall not be so changed, altered, or amended, as to reduce or increase the rates of toll hereby established, below or above a sum necessary to defray the expenses incident *747] to the preservation and repair of the said road, to the erection of gates and toll-houses *thereon, and for the payment of the fees or salaries of the superintendent, the collectors of tolls, and such other agents as may be necessarily employed in the preservation and repair of the same, according to the true intent and meaning of the act." The act of Congress of the 2d of March, 1831, (4 Story L. U. S., p. 2250,) is nothing more than a literal recital of the law of Ohio, and an entire and unqualified assent to, and adoption of, that law. These statutes comprise all that has been ever done by the state and federal governments, which amounts to any thing in the nature of an agreement or compact between them in reference to the Cumberland road. Let us now inquire what it is that, by reasonable and proper construction, these laws import? And it should, in their examination, ever be borne in mind, that whatsoever the law of Ohio has ordained in reference to its subject matter; whatever rights or powers it has claimed for the state in regard to it, the act of Congress has unconditionally recognized the whole. The second proviso of the 4th section, already quoted, contains no stipulation

that ordinary travellers or passengers, or any others indeed, or any descriptions of property, save those expressly enumerated in the proviso, shall pass upon the road free of toll. It concedes to the federal government that stages carrying the mail, i. e. the carriages and the horses necessary for their use, and the mail itself, should not pay toll; but with respect to private travellers, and to every thing within or without those carriages, the law is entirely silent. By what correct implication, then, can the power of the state to levy tolls on travellers in such carriages be taken away. I can conceive of no implication tending to such a result, which would not obviously do violence to the language of the statute, as it would to every correct rule of construction, and to every intendment consistent with the natural and plain objects of the law. The fact that the state has exacted tolls on passengers in the stages carrying the mails, only beyond a certain number of carriages so employed, can by no correct reasoning affect the right of the state in this matter, however it might be received as a measure either of policy or liberality; for having the power absolutely to exact tolls of all travellers on the road not exempted by the proviso, this power carried with it, by every sound rule of logic, the right to discriminate between the subjects of her power. She had then a perfect right to declare that travellers in specified carriages carrying the mail should pass free of toll, and that those transported in other vehicles, although bearing the mail, likewise should be subjected to the payment of toll. Such a regulation the state had the power to enact, had it been the dictate of mere caprice. A correct apprehension, however, of her policy and interests in reference to this road, and in reference to the accommodation of the public, will develop a more enlarged and more equitable motive for the measures adopted by the state, showing those measures [*748
to have been produced by the *force of supervening circumstances. It cannot be denied, that in assuming the management of this road, the purpose of the state was to maintain and preserve it as a commodious highway. By the title of the law passed for its assumption, viz., "An act for the preservation and repair of the United States road," as well as by every clause and provision of that law, this object is clearly evinced. It is equally undeniable, that the means in contemplation for the accomplishment of this object were the usual and natural means by which artificial highways are supported, viz.: the tolls collectable on travellers and on property transported upon it. The concession to the federal government of the free passage of a portion of its mails over this road, and of the vehicles in which they might be carried,

was an act of fairness and liberality which should not be made the pretext for abuse and monopoly, such as must, if permitted, dry up the source whence the means of maintaining the road are to be derived, and which would operate for the exclusive advantage of the favorites of such monopoly, and for the serious injury of the public. To guard against consequences like these, the power reserved by the 15th section of the law of 1831 was retained by the state, a power expressly recognized to its full extent by the act of Congress adopting the former law; and it can as little be doubted, that, in the practical experience of those consequences, and in the intention of applying a remedy for them, the law of Ohio of March 9th, 1838, and the order of the Board of Public Works of the same state, had their origin.

But it is argued that the exaction of tolls on travellers in stages carrying the mails, would be a violation of the compact between the two governments, because it would enhance the demands of contractors for transporting the mail, and thereby become a tax upon the federal treasury, and in the same degree an impediment to the conveyance of the mails. It is a sufficient reply to such an argument to remark, that neither the law of Ohio nor the act of Congress adopting that law, stipulates any exemption from tolls on travellers, but the exemption is limited to carriages only; and it is an inflexible rule of contract, too familiar to be commented on here, that neither party, singly, can superadd a term or condition to a contract completed. This argument is therefore utterly without force, even if the effects it seeks to deduce could be demonstrated. It is fallacious too in another respect. The monopoly in support of which it is adduced, by enabling the mail contractor to drive off all competition, whilst it puts it in his power to withhold the tolls by payment of which the road would be supported, enables him to practise the very extortions upon the government which fair competition would be the surest means of preventing. But conceding, for the moment, that a denial to the contractor of the privilege now contended for, might enhance the price of transporting the mails, the
*749] question still very properly arises, whether this effect *(were the language of the law even doubtful) would justify the extension to him of such a privilege? A just view of the legislation of both the state and federal governments, and of the obvious purposes of that legislation, must compel a negative answer to this question. The purposes designed by this legislation were the preservation and repair of the National road. Such are the objects announced, not only in the titles of the laws themselves, but provided for in all their enacting

sections; and the *quo modo* declared by these enactments is the levying of tolls. Is it then reasonable or logical, or rather is it not inconsistent and contradictory, to attempt to deduce from them conclusions which fall not within their terms, but which go to defeat every end which must have been within the contemplation of the parties; for which indeed these enactments all profess to have been made. Is not this attempt in violation of all rules for the construction either of statutes or contracts, which always preserve the main and obvious intentions of legislators or of contracting parties, to the exclusion of minor though seemingly contradictory considerations? But the language of these laws is by no means equivocal. Except for the exemption contained in the second proviso of the 4th section of the Ohio statute of 1831, all mails and the carriages in which they are transported, the troops, arms, and property of the United States of every description, would have been subject to the payment of tolls; and the exemption can be extended no farther than the plain and natural import of the language of that proviso will justify.

Again, it has been said, that the exaction of tolls from travellers in the mail-stages would be a violation of the contract, because by such a demand travellers would be excluded from those stages, and that the safety of the mails would be endangered by this exclusion; it being assumed by this argument that the travellers are to constitute a guard to the mails. To this seemingly strange and far-fetched argument, it might be sufficient to answer, as was done to the former, that no stipulation for the transportation of such a guard, (if by any violence to language ordinary casual wayfarers could be so denominated,) is contained in the contract; and that the attempt thus to introduce any such stipulation or engraft it upon that contract, is a palpable and unwarrantable interpolation upon its terms and its objects. In the next place, the propounders of this argument may be challenged to show either the duty or the willingness of such travellers, to take upon themselves the hazards, the trouble, or the responsibilities of guarding the United States mails. With equal cogency may those who thus reason be called upon to prove, that amongst the promiscuous multitudes who travel in stages, there may not be comprised those who roam the country with the view of committing depredations, and from whose designs the safety of the mails may be most endangered.

Upon a full consideration of this case, I am brought to conclude, *that the acts of the legislature of Ohio, [*750 subsequent in date to the 2d of March, 1831, and the proceedings of the Board of Public Works of that state, founded

upon those statutes, are in violation of no principle or right guarantied by the Constitution of the United States, nor of any acts of Congress passed in pursuance thereof; nor of any contract at any time existing between the state of Ohio and the federal government. I am farther of opinion, that the aforesaid laws of Ohio were on the contrary designed, and are of a tendency, fairly and justly, to distribute the tolls collectible within her limits, on the road in question, so as to make them properly subservient to the views of the federal government and of the government of Ohio, at the times of passing of the state law of February 4th, 1831, and the act of Congress of the 2d of March, 1831; and in conformity with the express language of those laws; and to prevent unwarrantable monopoly, and serious if not fatal detriment to the road. I think that the decision of the Supreme Court of Ohio, being a correct exposition of the laws designed to effect these important objects, ought therefore to be affirmed.

LESSEE OF PHILIP HICKEY ET AL., PLAINTIFF IN ERROR v. JAMES A. STEWART ET AL.

A defendant in ejectment cannot protect himself by setting up the record in a prior chancery suit between the same parties, by which the plaintiff in the ejectment had been ordered to convey all his title to the defendant in the ejectment, but in consequence of the party being beyond the jurisdiction of the court, no such conveyance had been made.

And this is so, although the Court of Chancery, in following up its decree, had legally issued a *habere facias possessionem*, and put the defendant in ejectment in possession of the land.[1]

By the treaty of 1795, between the United States and Spain, Spain admitted that she had no title to land north of the thirty-first degree of latitude, and her previous grants of land, so situated, were of course void. The country, thus belonging to Georgia, was ceded to the United States, in 1802, with a reservation that all persons who were actual settlers on 27th October, 1795, should have their grants confirmed. Congress provided a board of commissioners to examine these grants, and declared that their decision should be final.[2]

The Court of Chancery of the state of Mississippi had no authority to establish one of these grants which had not been brought within the provisions of the act of Congress. The claim itself being utterly void, and no power having been conferred by Congress on that court to take or exercise jurisdiction over it, for the purpose of imparting to it legality, the exercise of jurisdiction was a mere usurpation of judicial power, and the whole proceeding of the court void.

The doctrine of this court in *Elliott* v. *Peirsol*, 1 Pet., 340, reviewed and con-

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[1] See *Pulliam* v. *Pulliam*, 10 Fed. Rep., 47.

[2] APPLIED. *United States* v. *King*, *post* *787. RELIED ON. *La Roche* v. *Jones*, 9 How., 170. CITED. *Robinson* v. *Minor*, 10 How., 644.

firmed, viz., "that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court where the proceedings of the former are relied on, and brought before the latter by the party claiming the benefit of such proceeding." [3]

*THIS case was brought up, by writ of error, from the Circuit Court of the United States, for the southern district of Mississippi. [*751

It was an ejectment brought by Hickey's lessee against the defendants, as the heirs of Robert Starke, for two thousand acres of land in the state of Mississippi.

The facts in the case are fully set forth in the opinion of the court.

The question was, whether or not the court below erred, in permitting to be read in evidence, on the part of the defendants, the record of a former chancery suit between the same parties, in which the court had decreed that all the title of *Hickey et al.* should be conveyed to the heirs of Starke.

Coxe and *Walker*, for the plaintiff in error.
Henderson and *Jones*, for the defendants in error.

Coxe said that the condition of the country where the land in question was situated was described in 12 Wheat., 524. The distinction is important between an acquired country and that where a disputed boundary was settled. Different codes of laws prevail in the one and the other. 12 Wheat., 535, another case.

This being an adjusted boundary, there was no obligation to recognize Spanish grants. 12 Wheat., 535.

The United States derived all their proprietary title from Georgia, 1 Laws U. S., 488; and took it only upon certain conditions, 3 Id., 39, 380, 491, 546.

The act of 1803 provided that the decisions of the commissioners should be final. Under it, our claim was registered and confirmed, in 1804.

Our title is therefore complete. But the defendants set up the decree of a court of equity, and the first question is, can the courts of the United States recognize any power in a state court to divest us of our title? The judgment of the commissioners was made final; and as to the effect of this, see 4 Cranch, 269; 9 Id., 127; 3 Wheat., 246; 6 Id., 109; 9 Pet., 8; 10 Id., 449; 2 Bos. & P., 392.

Decisions may be impeached for fraud; but it must be fraud

[3] RELIED ON. *Williamson* v. *Berry*, 8 How., 541. CITED. *Thompson* v. *Whitman*, 18 Wall, 467. See note to *Williamson* v. *Berry*, *supra*.

in obtaining the judgment, and not pre-existing. Story Confl. of Laws, 590, 591, 592; 2 Kent Com., 118.

The state of Mississippi could not have divested us of our title by an act of legislation. How then can one of its courts do it?

Again, it is a decree of a court of equity. The title of the plaintiff is a statutory title from the United States, whose authority no one doubts. Can equity interfere? The act of Congress says that the decision of the commissioners shall be final. The rule of law is positive, and equity cannot relieve against a positive law. 1 Story Eq., §§ 10, 11, 64.

*752] *An action at law cannot be maintained upon a decree in equity. 8 Wheat., 697; 3 Barn. & Ad., 52.

If the party cannot maintain a suit, he cannot defend himself in ejectment. Lewin Trusts, 247, 482.

(*Coxe* then objected to the decree in many points of form.)

Henderson, for defendants.

Of the second and third instructions refused to the plaintiffs, we justify the court's refusal in the language of the decree itself:

"That the title of the defendant was obtained by fraud and force and violence, against the equity of complainant's ancestor, * * it is therefore ordered, adjudged, and decreed, that the title of defendants to said tract of land be, and the same is hereby declared to be fraudulent and void as against complainants."

The legal title of the plaintiffs herein does not, therefore, "remain unaffected at law by said decree," * * and the decree does not limit its cancellation of title to equity merely; but it finds and adjudges the title "fraudulent and void," as against our grantors and title. And so, too, we defend the court below in refusing the fourth instruction asked by plaintiffs below.

The decree is, that the defendants shall "deliver to complainants the full, peaceable, and actual possession of said tract of land."

The presumption of law must arise, therefore, that the facts found to subsist, in conformity with the decree, were brought about in conformity with its command, and possession so surrendered, and so taken, may assuredly be lawfully retained. It was so ordered to be given, that it might be retained.

And of the charges given by the court, at the instance of the defendants, they vindicate themselves on reading—self-evident propositions on their face.

Without further noting these particular criticisms, we

pass to meet the substantial propositions from which they proceed, viz.:

1. Was the chancery record admissible in evidence for any purpose? and if so,

2. What was its legal effect?

It is objected, that these chancery proceedings do not purport to be record at all. But besides, that the defendants have denominated and regarded them as a record, and acted upon them as a final decree of the highest court of law and equity in the state, and should therefore be estopped in this objection, (see the case on their appeal, 1 Pet., 94;) it is manifest, on inspection, it possesses all the elements of a formal and complete record. It is between all proper parties, and consists of a bill, answer, plea, and replication.

Much testimony on the matter in controversy appears to have been taken, on which the court exercised their chancery discretion in directing an issue at law. This was duly tendered, joined in, and verdict thereupon rendered; exceptions taken, argued, and overruled, *and thence [*753 decree ordered, made out, and duly enrolled, and then thereafter appealed from to the Supreme Court of the United States. A judicial proceeding with these forms and contents, duly certified as it is, must be a record. 7 Cranch, 408.

It is assumed, too, that the Supreme Court, in treating the case as with plenary and original powers, transcended their jurisdiction. This conclusion is deduced from the assumption that, as the decree was not pronounced till 1824, the powers of the court were governed by the laws of 1822, found in Poindexter's Code; and that, by these laws, the Supreme Court, in such a case, could only certify its opinion to the inferior court to which the case had been referred; and the inferior court must adopt and execute a final decree in conformity with the opinion so certified.

We do not consider, if this record were to be tested by the acts of 1822, in Poindexter's Code, the conclusions of the appellants would follow, or that the final jurisdiction exercised by the Supreme Court in this case would be rendered doubtful. See sect. 30, p. 91; sect. 8, p. 150; sect. 21, p. 154, of Poindexter's Code.

But, it is to be observed, this bill in chancery was filed in the "superior court of law and equity," in Adams county, as early as 1815. The date of filing the bill does not appear in the record, but the plea of one of the defendants is sworn to 14th of October, 1815. The controversy continued a *lis-pendens* till final decree at December term, 1824.

The territorial act of 22d December, 1809, (Turner Dig.,

p. 178, sect. 116,) gave the jurisdiction under which this suit was instituted.

A further act of the territory, of 20th January, 1814, (Turner Dig., p. 201, sect. 203,) gave the jurisdiction of the Supreme Court by which they took cognisance of the cause on reference, and which expressly authorized them "to grant judgment thereon according to the right of the matter, and award execution."

In the year 1817, the territory became a state, and the laws generally were soon afterward, in 1822, revised by Poindexter, to conform to the modified system of jurisprudence appointed by the new constitution. By this constitution, the jurisprudence of the Supreme Court was not specified, but left to the legislature to prescribe. See Constitution, title "Judicial Department," p. 550, Poindexter's Code.

The act of 1822 (sect. 5, pp. 149, 150, Poin. Code,) established this jurisdiction. The Poindexter Code was adopted and operative in 1823, and while this chancery case was yet pending. But the code expressly saved from its operation all such cases as were pending, by providing, per sect. 7, p. 8, of the Code,

"That all remedies, which shall have been commenced under former laws, shall be and remain as though the said code had never been adopted."

*754] *This decree is therefore in conformity to the laws in Turner's Digest, and this exception of the appellants is manifestly groundless. And full to this point, see *Blanchard's Adm.* v. *Buckbolt's Adm.*, Walk. (Miss.), 64.

It is further objected to this record and decree, that the Chancery Court of Mississippi had no jurisdiction of the subject-matter, on the ground that the title of the patentee was fixed by the government or sovereign power: 1st, by the decision of the Spanish Governor; 2d, by the 1st article of the compact of cession from Georgia to the United States, of 1802; and 3dly, by the ascertainment of those entitled to confirmation under said article by the board of commissioners, as per section 6 of act of Congress of 3d March, 1803.

To this we answer, 1st, that no title, emanating from this or any other government, for lands now within the United States, can claim immunity from investigation and adjudication in the courts. And if the wilful wrong or mistake of the ministerial officers of government, or the fraud and misrepresentation of the donee or grantee, has induced the issuance of a patent to one who, by the laws and policy of the government, was not equitably entitled to receive it, the court may, as they perpetually do, redress the wrong. And 2dly, as to the claim under

the act of cession, the appellants cannot be heard to invoke any protection to their title from that article, to the prejudice of the court's jurisdiction, as they did not show themselves within the provision of that article on that occasion. See the case on appeal, 1 Pet., 94. And showing it now, could in no degree impair the jurisdiction then exercised. The patentee did not, in the chancery suit, prove himself a settler on 27th October, 1795. But had it been shown, by the finding of the board of commissioners under the 6th section of the act of 1803, such proceeding could not preclude Starke from his judicial inquiry into his rights for the same lands; and so the Supreme Court in Mississippi had previously adjudged. See case of *Winn* v. *Coles' heirs*, Walk. (Miss.), 119; 2 How. (Miss.), 603.

It having been thus shown, the court in Mississippi had rightful jurisdiction of the cause, their decision upon the matters in issue, and embraced in the decree, is final and conclusive until reversed. 16 Pet., 87; 6 Wheat., 109; 1 Mason, 515; 3 Wash., C. C., 28; 1 Brock., 126; 3 Dall., 101; 2 How. (Miss.), 338 to 342.

What then shall be adjudged the proper and legal effect of our record, as offered in defence to the plaintiff's action. The decree entitled those under whom we claim to have had a formal conveyance of the legal title from the patentee. The order in this behalf having been disregarded, this act of contumacy is now relied on as remitting the parties to their patent right of title, unaffected by the decree pronouncing it fraudulent and void as against us.

In the view we entertain of this point, the inquiry is not regarded *essential, whether our decree has qualified the legal title with a trust to our use or not; or whether, in this relation of trustee and *cestuis que trust*, our equitable title is a bar in ejectment to the recovery of our trustee against us. We think the authorities would sustain us in this position. A mortgagee, whose debt has been paid to him, or a party holding the legal title as a resulting trust, or that of a trustee by deed, after the trust is fully executed, cannot maintain ejectment against his *cestui que trust*, so entitled to call for the immediate conveyance of the legal estate. 2 Har. & M. (Md.), 17; 7 Wend. (N. Y.), 379; 3 Johns. (N. Y.), 222; 2 Wend. (N. Y.), 134; 6 Munf. (Va.), 41; 1 Cowp., 46; 18 Johns. (N. Y.), 12. [*755

And an equitable title, of like description, is also adjudged in Mississippi, (whose decisions must furnish the law to this court in this case,) as a bar to this action. *Brown* v. *Weast's heirs*, 7 How., here in manuscript.

Clear, however, as our defence may be, under this aspect of the authorities, we think it more obviously sustained, on grounds less technical and of more ready comprehension, viz.: upon the rule, that whatever takes away the plaintiff's right of possession, must bar his recovery in ejectment, notwithstanding his legal title. This rule is displayed in its most simple instances, when the defendant claims as a lessee, or tenant in dower, or by the courtesy, &c. But it holds whenever the right to possession exists in one party, though right of property be in another. 6 Pet., 441, 442; 9 Wheat., 524; 8 Wash. C. C., 204; 16 Johns. (N. Y.), 200.

Now the decree offered in evidence has expressly found, that the patent is fraudulent and void as against the better right of our vendors. And the defendants therein, besides being commanded to convey their title to the complainants, are required also, within sixty days thereafter, to "deliver to complainants the full and peaceable and actual possession of said tract of land."

Our derivative title under those complainants, and our actual possession of the said tract of land being admitted, our right to the possession must be sustained at law or equity.

In the Cincinnati common case, 6 Pet., 441, the defendant's claim to right of possession was established by no such formal and solemn proof as here presented, and yet sustained as a bar to the ejectment. The matters put in issue by the parties in our record, and found by the decree, are proven and established conclusively, till the judgment be reversed. 6 Wheat., 113, 114, 117; 3 Wash. C. C., 28; 1 Brock., 129. And, in deraignment of title before a court, a decree of title is good evidence even against a stranger to the record. 4 Wheat., 217.

The appellants maintain, however, that the matters decreed in a court of chancery are only available as evidence in a chancery court; or if admissible at all, in a court of law, must be received with diminished consideration, than if adjudged in a court of law. Not so.

*756] *The cases of 6 Wheat., 113, 114, and 3 Wash. C. C., 28, were of decrees offered in evidence in courts of law, and held of equal validity as judgments at law. And the former speculative opinions, that debts and charges on real estate, established by decree, were of less dignity and validity than judgments at law, no longer prevail. 3 P. Wms., 401, n. (F.)

In the view we have taken of the sufficiency of our defence in showing our right of possession, it is of course unnecessary to maintain that a decree of title, in legal consideration, is equivalent to a conveyance of title. Yet on principle, it must

be so. A commissioner's deed, executed under a decree, is in itself form without substance. It has no force or validity, but in virtue of the decree. 6 Pet., 400, 401. In 10 Id., 245, it was decided, that a deed of conveyance, made pursuant to a decree, was in effect cancelled and annulled by a reversal of the decree under which it was executed. But if, as the appellants would maintain, the deed so executed passed the legal title, it is adjudged in this case that the mere reversal of the decree cancels and revests the legal title. Why, then, when the decree, (as in our record,) acting directly on the legal title, cancels it in the hands of the holder, and expressly adjudges it to belong to another; why does it not transfer the legal title? In 1 Pet., 558, 559, 560, this principle is fully maintained. True, the statute of Ohio is referred to for its authority, but *quære*, if that statute should be regarded as any thing more than declaratory of the legal effect of a decree of title.

Chancellor Kent considered the decree, even on the foreclosure of a mortgage, to operate so directly on the land and the title, that on motion of the purchaser of the land (sold under the decree) to have possession awarded him against the mortgagor's wife who refused to surrender, it was adjudged the decree concluded the question of possession, as against all parties and privies, and the court's writ of assistance was directed in favor of the application, and this, though the decree had not directed the possession, should be so surrendered. 4 Johns. (N. Y.) Ch., 614.

We believe, therefore, our case is so fortified in every aspect, both in its equity and at law, that this court must affirm the judgment of the court below.

Mr. Justice McKINLEY delivered the opinion of the court.

This case is brought before the court by a writ of error to the Circuit Court for the southern district of Mississippi.

The plaintiffs brought an action of ejectment against the defendants in the court below; and upon the trial, the plaintiffs read in evidence, to the jury, the copy of a plat and certificate of survey, signed by Charles Trudeau, royal surveyor of the province of Louisiana, for two thousand acres of land, French measure; and a patent, issued by the Spanish governor of that province, thereupon, to James *Mather, [*757 dated the 3d of April, 1794; and a deed of conveyance from James Mather to George Mather, dated the 26th day of April, 1803, for the same tract of land; and they also read in evidence a certificate, dated the 10th day of April, 1806, signed by the commissioners, appointed by the President of the

United States, under the act of Congress, of the 3d of March, 1803, and the act, supplemental thereto, of the 27th of March, 1804, confirming to George Mather the said tract of land, by virtue of the articles of agreement and cession between the United States and the state of Georgia. It was also proved that George Mather died, about the year 1812, and that James Mather was his heir; and that James Mather had died pending the suit; and it was admitted by the defendants, that the plaintiffs were the heirs of James Mather, "and whatever title he had at his death vested in them or any others, his heirs, to be shown."

And it was admitted by the plaintiffs, "that the defendants were in possession of the land in controversy, and were so at the time this suit was brought, under derivative titles from Robert Starke's heirs, valid so far as Starke's title was valid." And the defendants in support of the issue, on their part, offered to read the record of the proceedings in a suit in chancery, in the Supreme Court of the state of Mississippi; in which the heirs of Robert Starke were complainants, and the heirs of James Mather defendants. And by which record it appeared, that the complainants set up and claimed title to the land, here in controversy, under a warrant or order of survey, for two thousand acres of land, dated about the 29th day of December, 1791, and the survey thereon; and the defendants claimed title under the survey and patent of the Spanish government to James Mather. And by the order and decree of that court, the land in controversy in this suit, was adjudged and decreed to the heirs of Robert Starke.

To the reading of which record and proceedings, as evidence to the jury, the plaintiffs objected, on these grounds: "First. That it does not purport to be a record on its face, and in its context. Secondly. That said record does not disclose, nor contain a final decree; neither the said record, nor the said decree therein being signed by the judges of the said Supreme Court of Mississippi. Thirdly. That the pleadings and context of said record show, that the chancery suit was entertained and treated by said Supreme Court as a matter of original jurisdiction; whereas the statutes of Mississippi expressly provide, that the opinion of the Supreme Court shall be certified to the court below, whose action and adoption alone can render the opinion of the Supreme Court final upon a question of law adjourned for its opinion. Fourthly. That the facts and the law of the case did not give the Chancery Court jurisdiction, inasmuch as, after the treaty of 1783, a Spanish warrant or order was a mere nullity, and could only be rendered valid, by the holder bringing himself within

the first section of the act of Congress of 1803, by *residence and cultivation; whereas, as the record shows, that Starke was not within that act; nor, if he had been, could he have derived any equity against a title, confirmed by the articles of agreement and cession between Georgia and the United States, of the 14th of April, 1802. Fifthly. That jurisdiction, legal and equitable, was vested elsewhere, by the 6th section of the act of 1803; such investiture of jurisdiction in an inferior tribunal being exclusive of that of any other tribunal. Sixthly. That a record or decree out of chancery is not evidence of a legal, but an equitable title only, and is, therefore, not pertinent to the issue joined. Seventhly. That the decree, if read at all, must be read as an estoppel by the record, and subject to the rules as to estoppels. Eighthly. That a decree in chancery must be read on the same footing as a judgment at law; and unless carried out by a conveyance, can have no greater effect than a judgment in ejectment."

The court overruled these objections, and permitted the record to go to the jury, as evidence of any fact decided by it. To which opinion of the court the plaintiffs excepted. The plaintiffs, among other instructions, some of which were refused and some granted, but which need not be noticed here, moved the court to instruct the jury, "that the decree read in evidence, by the defendant's counsel, does not *per se* divest the plaintiffs, or the ancestors of the plaintiffs, of the legal title, but that said title remains unaffected at law by said decree, and is still in plaintiffs, if the jury believe them to be the heirs of said Mather."

There were several instructions moved by the defendants, some of which were granted, and some refused; but as they are either included in the ruling of the court, already noticed, or unnecessary to the decision of the points on which we think this case ought to be decided, they will not be noticed in the investigation of the subject.

Two questions are distinctly presented by the ruling of the Circuit Court. First. Whether the decree in the suit in chancery was a bar to the action of the plaintiffs. Secondly. Whether the Court of Chancery had jurisdiction of the subject matter in controversy before it in that case. For the plaintiffs in error, it has been insisted, that the decree is not evidence of a legal title, even if it were otherwise valid, and, therefore, no bar to the action of ejectment; and that the possession of the defendants under the decree, without a deed of conveyance as directed by it, whether by the writ of *habere facias possessionem* or otherwise, gave no legal title to the defendants; and, therefore, opposed no legal bar to the plain-

tiffs' action. And, secondly, it was insisted, that neither the Court of Chancery, nor the Supreme Court of the state of Mississippi, had jurisdiction of the subject matter presented by the bill of the complainants. The whole power to confirm Spanish titles, protected by the contract of cession by the state of Georgia to the United States, having been conferred, by act of Congress, on a board of commissioners, *whose decision was by law made final, no other court could decide upon the validity of those claims.

*759]

The converse of these propositions was maintained by the counsel for the defendants. And it was insisted, that the decree operated as a conveyance, and also as a judgment in ejectment, the Court of Chancery having the power by statute to award the writ of *habere facias;* and, therefore, the decree, and possession under it, is a legal bar to the action of ejectment. And upon the second point it was insisted, that the jurisdiction of the court over the subject matter of the decree could not be inquired into by the court below, nor by this court, when brought before either collaterally. To arrive at the legal effect of the decree, we must inquire into the object and intention of the complainants in bringing the suit in chancery. They charge in their bill, that James Mather had obtained from the Spanish government the legal title to the land in controversy, in fraud of the rights of their ancestor, Robert Starke; and they pray that by decree of the court, Mather may be compelled to surrender to them the full and entire possession of the land, together with the evidences of title which he has thereto, and that they may be quieted in their title; "and such other and further relief in the premises as to the court shall seem meet."

The court by its decree established the right of the complainants to the land in controversy, and ordered Mather's heirs, who were all non-residents of the state of Mississippi, to convey the land to the complainants, and to deliver to them the possession, and awarded the writ of *habere facias;* which writ the Court of Chancery is authorized to order by a statute of the state. Without the aid of this writ, the court could not have put the complainants into possession, the defendants being out of their jurisdiction; nor could they for the same reason compel a conveyance of the title to the land. The decree is, therefore, if otherwise valid, nothing more than an equitable right, ascertained by the judgment and decree of a court of chancery; and until executed by a conveyance of the legal title, according to the decree, Starke's heirs, and those claiming under them, have nothing but an equitable title to the land in controversy.

To enable the defendants in this case to defend their possession successfully, upon their own title, that title must be shown to be a good and subsisting legal title, and superior in law to that set up by the plaintiffs; otherwise it opposes no legal bar to the recovery in the action of ejectment. And conceding, what was contended for in argument, that the decree and possession under it, by the writ of *habere facias*, is equivalent to a judgment in ejectment, followed by like possession, it would avail the defendants nothing in this case; because such a judgment and possession are no bar to another action of ejectment for the same premises.[1] The defendant in ejectment can never defend his possession against the plaintiff upon a *title in himself, by which he could not recover the possession, if he were out, and the plaintiff in possession. Reversing the positions of the parties in this case, could the defendants, if plaintiffs, recover the land in controversy upon this decree, and evidence of possession under it, against the title of the plaintiffs? We have no hesitation in saying they could not; and, therefore, the decree, if founded upon a valid equitable title, would be no legal bar to the action of the plaintiffs. [*760

[1] The action of ejectment is only a possessory action—to determine who is entitled to the possession of the land at the moment suit was brought for it. As Lord Mansfield said, the plaintiff ought to recover, though but for a week, for the true question in an ejectment is, who has the possessory right. Bull N. P., 106; *Clarke* v. *Rowell*, 1 Mod., 10.

"It is a recovery of the possession without prejudice to the right, as it may afterward appear, even between the same parties." *Atkins* v. *Horde*, 1 Burr., 114; see *Crockett* v. *Lashbrook*, 5 T. B. Mon. (Ky.), 531; s. c. 17 Am. Dec., 98; *Mitchell* v. *Robertson*, 15 Ala., 412; *Pollard* v. *Baylors*, 6 Munf. (Va.), 433; *Clubine* v. *McMullen*, 11 U. C. Q. B., 250; *Moran* v. *Jessup*, 15 Id., 612; *Smith* v. *Sherwood*, 4 Conn., 276; s. c. 10 Am. Dec., 143; *Holmes* v. *Carondolet*, 38 Mo., 551; *Jackson* v. *Dieffendorf*, 3 Johns. (N. Y.), 270. The only effect of the judgment is to put the defendant in possession, *Minke* v. *McNamee*, 30 Md., 294; and if he is ousted a second time, after having been put in possession by the execution officer, he must resort to a second action; he cannot have a second execution on the same judgment. *Hinton* v. *McNeil*, 5 Ohio, 509; s. c. 24 Am. Dec., 315. Even several verdicts against the defendant, who then accepts a lease from the plaintiff, and promises to give no more trouble, are not conclusive against the promisor. *Richardson* v. *Stewart*, 2 Serg. & R. (Pa.), 87.

A judgment is never admissible in evidence between the same parties unless the precise point which is in issue was put in issue and appears from the record to have been decided. In the second suit in ejectment, this is impossible, for the same point is not put in issue—a point in difference of time. *Smith* v. *Sherwood*, 4 Conn., 276; s. c. 10 Am. Dec., 143; *Stevens* v. *Hughes*, 31 Pa. St., 381. In several cases such judgments have been allowed to go to the jury, to be by them treated as persuasive, but not conclusive evidence of the facts upon which they were based. *Doe* v. *Seaton*, 2 Cromp. M. & C., 728; Bull. N. P., 2326; *Wright* v. *Tatham*, 1 Ad. & E., 3; *Doe* v. *Wright*, 10 Id., 763; *Thompson* v. *Hall*, 31 U. C. Q. B., 375. Conferring judgment does not change the rule. *Botts* v. *Shields*, 3 Litt. (Ky.), 32; contra, *Secrist* v. *Zimmerman*, 55 Pa. St., 446.

To a correct understanding of the question of jurisdiction, argued at the bar, it is necessary to ascertain the character of the grant set up by Starke's heirs in the suit in chancery. This grant was obtained from the Spanish governor of Louisiana, prior to the treaty between the United States and Spain, of the 27th of October, 1795. By this treaty, Spain admitted she had no right to the territory north of the thirty-first degree of north latitude. In consequence of which, all the grants made by her authority, within that territory, were void. This territory then belonged to the state of Georgia; but by deed, bearing date the 24th day of April, 1802, she ceded it to the United States. And in that deed it was stipulated, "that all persons who, on the 27th of October, 1795, were actual settlers within the territory thus ceded, shall be confirmed in all the grants legally and fully executed prior to that day, by the former British government, or the government of Spain," &c. The first section of the act of Congress of the 3d of March, 1803, chap. 80, (2 Story's Laws, 893,) enacts, "That any person or persons that were residents in the Mississippi territory on the 27th of October, 1795, and who had prior to that day obtained, either from the British government of West Florida, or the Spanish government, any warrant or order of survey for lands lying within said territory, to which the Indian title had been extinguished, and which, on that day, had been actually inhabited and cultivated by such person or persons, or for his or their use, shall be confirmed in their claims to such lands in the same manner as if their claims had been completed." This section places those who had obtained a warrant or order of survey upon the same ground with those who had complete titles. The 5th section of the act declares, "That every person claiming lands by virtue of British grant, or of the three first sections of this act, or of the articles of agreement and cession between the United States and the state of Georgia, shall, before the last day of March, 1804, deliver to the register of the Land-office, within whose district the land may be, a notice in writing, stating the nature and extent of his claims, together with a plat of the tract or tracts claimed; and shall also, before that day, deliver to said register, for the purpose of being recorded, every grant, order of survey, deed of conveyance, or other written evidence of his claim, and the same shall be recorded by the said register in books to be kept for that purpose." And upon the failure of the claim-
*761] ant to comply with these requirements, *his claim is declared to be void, and shall never "be received or

admitted as evidence in any court in the United States against any grant derived from the United States."

The 6th section of the act provides for the appointment of two boards of commissioners, for the purpose of ascertaining the rights of persons claiming the benefit of the articles of agreement and cession between the United States and the state of Georgia, and of the three first sections of the act. Each board was authorized to hear and decide, in a summary manner, all matters respecting such claims within their respective districts, and their determination was declared to be final.

The record of the chancery suit between Starke's heirs and Mather's heirs, shows that Starke was not resident in the Mississippi territory on the 27th of October, 1795, but had removed therefrom some years before that period; that no notice of his claim had been given to the register of the Land-office, within whose district it lay, together with a plat of the tract claimed and delivered to the register, to be recorded as required by law. Nor does it appear that the claim was ever submitted to the board of commissioners for their determination. Many years afterwards, the exact time not appearing by the imperfect record read in evidence, the court of chancery for the Mississippi territory, without any authority having been conferred on it by act of Congress for that purpose, took cognisance of Starke's claim, and established its validity by its own judgment and decree.

In the case of *Henderson* v. *Poindexter*, 12 Wheat., 543, 544, the court says, "The whole legislation on this subject requires that every title to lands in the country which had been occupied by Spain, should be laid before the board of commissioners. The motives for this regulation are obvious; and as the titles had no intrinsic validity, it was opposed by no principle. Claimants could not complain, if the law which gave validity to their claims should also provide to examine their fairness, and should make the validity depend upon their being laid before that board. The plaintiff in error has failed to bring his case before the tribunal which the legislature had provided for its examination, and has, therefore, not brought himself within the law. No act of Congress applies to a grant held by a non-resident of the territory in October, 1795, which has not been laid before the board of commissioners. It is true that no act has declared such grants void; but the legislature has ordered the lands to be sold which were not appropriated in a manner recognized by law, and the land in controversy is of that description.

"If this view of the subject be correct, no Spanish grant,

made while the country was wrongfully occupied by Spain, can be valid, unless it was confirmed by the contract with Georgia, or has been laid before the board of commissioners." This tribunal was created for the express purpose of deciding *762] all questions arising under *the deed of cession by Georgia, securing to a particular class of claimants the lands they occupied and cultivated at the date of the treaty between the United States and Spain, of the 27th of October, 1795, and its decision was to be final; and therefore its jurisdiction was exclusive; unless, by express words, Congress had conferred concurrent jurisdiction on some other judicial tribunal. From these propositions results the inquiry, Whether the decree in the chancery suit was void, the court having no jurisdiction of the subject-matter of the decree, or only erroneous and voidable? If the former, then its validity was inquirable into in the current court, when offered as evidence, and it ought to have been rejected.[1]

According to the decision in case of *Henderson* v. *Poindexter*, above referred to, Starke's claim, when submitted by his heirs to the Court of Chancery, was utterly void; and no power having been conferred by Congress, on that court, to take or exercise jurisdiction over it for the purpose of imparting to it legality, the exercise of jurisdiction was a mere usurpation of judicial power, and the whole proceedings of the court void.

In the case of *Rose* v. *Himely*, Chief Justice Marshall said, "A sentence professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or by a body not empowered by its government to take cognisance of the subject it had decided, could have no legal effect whatever. The power of the court then is, of necessity, examinable to a certain extent by that tribunal, which is compelled to decide whether its sentence has changed the right of property. The power under which it acts must be looked into, and its authority to decide questions which it professes to decide, must be considered." "Upon principle, it would seem that the operation of every judgment must depend on the power of the court to render that judgment, or in other words, on its jurisdiction over the subject-matter which it has determined." In the case of *Elliott et al.* v. *Piersol et al.*, 1 Pet., 340, it was held by this court, that "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decisions be correct or otherwise, its judgment, until reversed, is regarded as

[1] CITED. *Bank of the United States v. Moss*, 6 How., 33.

binding in every other court. But if it acts without authority, its judgments and orders are regarded as nullities. They are not voidable but simply void, and form no bar to a recovery sought, even prior to a reversal, in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences are considered, in law, trespassers. This distinction runs through all the cases on the subject; and it proves, that the jurisdiction of any court exercising authority over a subject, may be inquired into in every other court when the proceedings of the former are relied on, and brought before the latter by the party claiming the benefit of such proceedings."

The same doctrine was maintained, by this court, in the case of **Wilcox and Johnson*, 13 Pet., 511, and the [*768 case of *Elliott et al.* v. *Piersol et al.*, referred to, and the decision approved. These cases being decisive of the question of jurisdiction, we deem it unnecessary to refer to any other authority on that point. From the view we have taken of the whole subject, it is our opinion, the decree of the Supreme Court of Mississippi would have been no bar to the action of the plaintiffs in this case, if the subject-matter of the suit had been within its jurisdiction. But we are of the opinion, that court had no jurisdiction of the subject-matter, and that the whole proceeding is a nullity. The Circuit Court erred, therefore, in permitting the record to be read to the jury, as evidence for any purpose whatever. Wherefore the judgment of the Circuit Court is reversed.

THOMAS WILSON AND COMPANY, PLAINTIFFS, *v.* HORACE SMITH, DEFENDANT.

Whenever, by express agreement of the parties, a sub-agent is to be employed by an agent to receive money for the principal; or where an authority to do so may fairly be implied from the usual course of trade, or the nature of the transaction; the principal may treat the sub-agent as his agent, and when he has received the money, may recover it in an action for money had and received.[1]

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[1] The head note to this case has been quoted with approval. *Miller* v. *Farmers & Mechanics Bank*, 30 Md., 392. An express authority to an agent to employ a sub-agent creates a privity between the principal and the sub-agent employed, and the latter is directly liable to such principal. *Bromley* v. *Campbell*, 2 Bos. & P., 438; *Catlin* v. *Bell*, 4 Campb., 183; *Goswell* v. *Dunkley*, 1 Str., 680; see *Lockwood* v. *Abdy*, 9 Jur., 267.

Where by the usages of trade the agent employs a sub-agent, the latter is liable to the principal. *Cochrane* v.

If, in such case, the sub-agent has made no advances and given no new credit to the agent on account of the remittance of the bill, the sub-agent cannot protect himself against such an action by passing the amount of the bill to the general credit of the agent, although the agent may be his debtor.[2]

THIS case came up on a certificate of division in opinion between the judges of the Circuit Court of the United States for the district of Georgia.

The record being very short, it will be inserted entire.

"This was an action of assumpsit brought in this court by the plaintiffs, to recover from the defendant the sum of eight hundred dollars and interest, being the amount of a draft or bill of exchange drawn by one Henry B. Holcombe, of Augusta, in the state of Georgia, upon one Charles F. Mills, of Savannah, in said state, and accepted by him, and paid to the defendant. The declaration contained two counts. The first was for money collected and received by the defendant to and for the use of the plaintiffs, upon the particular bill of exchange set out and described in the declaration; the second count was generally for money had and received. The plea of non-assumpsit was pleaded by the defendant in bar of the action, 'it being proved that the draft or bill of exchange upon which the money was collected and received by the defendant was the property of the plaintiffs;' that it had *764] been by them placed in the hands of their agent, David W. St. John, at Augusta, Georgia, for *collection, and by him, St. John, forwarded to the defendant, St. John's agent, at Savannah, Georgia, for acceptance and collection; that it was accepted and paid to the defendant, by whom the proceeds were received and credited to the account of St. John, from whom the defendant received the draft or bill for collection, and who was indebted to the defendant at the time. That at the time the said bill was so paid to the defendant, and by him credited to the account of St. John, he, St. John, had failed in business, and had departed this life; that he failed, and had

Irlom, 2 Mau. & Sel., 301; *Merrick* v. *Barnard*, 1 Wash., C. C., 479; *Foster* v. *Preston*, 8 Cow. (N. Y.), 198.

The general rule, however, is subject to the two exceptions above stated, that the sub-agent is not liable to the principal, because there is no privity between them, but only to the agent. *Cleeves* v. *Stockwell*, 33 Me., 341; *Cobb* v. *Becke*, 6 Q. B., 930; *Robbins* v. *Fennell*, 11 Id., 248; *Cartwright* v. *Hately*, 1 Ves., 292; *De la Viesca* v. *Lubbock*, 10 Sim., 629; *Pinto* v. *Santos*, 5 Taunt., 447; *Schmaling* v. *Tomlinson*, 6 Id., 147; *Tabor* v. *Perrott*, 2 Gall., 565; s. c. 9 Cranch, 39; see, however, *Lord North's* case, Dyer, 161; *Cull* v. *Backhouse*, cited, 6 Taunt., 148; *Solly* v. *Rathbone*, 2 Mau. & Sel., 298; *Lane* v. *Cotton*, 12 Mod., 488.

[2] APPLIED. *United States* v. *State Bank*, 6 Otto, 35. DISTINGUISHED. *Hoover* v. *Wise*, 1 Otto, 314. FOLLOWED. *First Nat. Bank of Chicago* v. *Reno County Bank*, 1 McCrary, 495, 497, 500.

not recovered his affairs at the time of his death, and was insolvent; that the credit for the amount of the bill, carried by the defendant to St. John's account, was made in payment of a previously existing debt due by St. John to the defendant, no new transaction having arisen between the defendant and St. John after the payment of the said bill to the defendant; 'that to secure the payment of his debt to the defendant, St. John had transferred to the defendant three hundred shares of the capital stock of the Augusta Insurance and Banking Company, upon which $100 per share had been paid; that the defendant appeared satisfied with this security, and that St. John would then have given additional security had the defendant required it.' That the draft or bill of exchange was made payable to the order of Henry B. Holcombe, the drawer, and by him endorsed in blank, and endorsed by St. John to H. Smith, Esq., (the defendant,) or order. That when the draft was sent to the defendant for collection he was not apprized to whom it belonged, nor were any instructions or directions given to him as to the disposition of the money when collected.

"The following point was presented, during the progress of the trial, for the opinion of the judges, on which the judges were opposed in opinion, viz.: Whether there was such privity of contract between the plaintiffs and defendant, either express or implied, as would enable the plaintiffs to maintain the action for money had and received.

"Which said point, upon which the disagreement has happened, is stated above, under the direction of the judges of the said court, at the request of the counsel for the parties in the cause, and ordered to be certified into the Supreme Court of the United States at the next session, pursuant to the act of Congress in such case made and provided."

Berrien, for the plaintiffs.
Nelson, (attorney-general,) for the defendant.

Berrien. The question is, whether there is such a privity of contract between the plaintiff and defendant, either express or implied, as will enable the plaintiff to sustain the action for money had and received.

It is not necessary that the relations of contract should exist between the parties.

*There are many cases in which the defendant has received the money of plaintiff, under circumstances which would render him liable *ex delicto*, in which plaintiff is permitted to waive the tort, and sue in this action. [*765

1 Leigh, N. P., 45, 46. Wherever defendant has received money, the property of plaintiffs, which defendant is bound *ex æquo et bono* to refund, it may be recovered in this action. *Moses* v. *McFarlane*, 2 Burr., 1012. The true question is the right of plaintiff to receive, or of defendant to retain the money.

In the eye of the law, there is always such privity of contract as is necessary to sustain this action, between a person who holds the money of another, which in equity and good conscience he is bound to refund, and the person whose money is thus withheld. *Camp* v. *Tompkins*, 9 Conn., 553.

Again. Where one has received the money of another, and has not the right to retain it, the law will imply privity of contract. *Mason* v. *Waite*, 17 Mass., 560; *Hall* v. *Marston*, Id., 575.

Two propositions may be laid down.

1. On the facts stated, Smith, defendant, was the agent of plaintiffs, bound to account to them on notice of their claim; and, therefore, the amount collected by him was money had and received to their use.

2. That his ignorance of the real owner of the bill cannot affect the right of plaintiffs to recover in this action, on notice and proof of their title, so long as defendant stands in his original situation, and until there has been a change of circumstances, by his having paid over the money to his immediate employer, or done something equivalent to it.

1. Smith, the defendant, was the agent of plaintiffs. The case states,—

1st. That the bill was the property of plaintiffs.

2d. That it was collected by defendant, who received it from St. John, the agent of plaintiffs.

On this state of facts, did the necessary privity exist? or, in other words, had defendant the right to retain after notice of plaintiffs' claim?

It is objected that delegated power cannot be delegated without authority for that purpose, because it implies trust and confidence, which cannot be assigned to a stranger. That the sub-agent has no claim upon the principal, for commissions, advances, &c., therefore is under no responsibility to him, his sole remedy being against his immediate employer, and therefore that his sole responsibility is to him. For qualifications of the rule, see Story on Agency, § 14, p. 16.

Authority implied.

Licensed auctioneer.—1. When indispensable by the laws to accomplish the end.

*766] *Ship-broker.—2. Ordinary usage of trade.

Factor.—3. Where understood by parties as the mode in which the business would or might be done.

The authority exclusively personal, unless from express provision, legal necessity, usage of trade, or fair presumptions growing out of particular transactions, a broader power was intended to be conferred. Story on Agency, § 14, p. 17.

Test the present case, by this rule, thus qualified.

A foreign house, holding a bill drawn on a citizen of Savannah, in Georgia, has a correspondent at Augusta, in the same state, to whom he remits it for collection, and by whom it is sent to his correspondent in Savannah, where the drawee resides.

Is this not conformable to the usual course of such transactions? Could plaintiffs have expected that St. John, abandoning his own place of business, should have repaired to the distant residence of the drawee, to present this bill personally? Would not the remittance of it there, to his correspondent, be "understood by the parties to be the mode in which this particular business would or might be done?" Was St. John bound to do more than select a competent and trust-worthy agent to receive the contents of the bill? If with the bill he had stated plaintiffs' interest, would any have doubted that defendant would have been the agent of plaintiffs in this matter? and does this not settle the right to delegate his authority? What effect withholding that information would have, will be considered hereafter.

It suffices at present, in order to sustain the first position, to show that this bill was dealt with according to the usual mode of transacting such business. That in appointing a sub-agent, St. John did no more than plaintiffs designed and intended. If so, defendant was agent of plaintiffs, by an authorized substitution; an authority implied from the circumstances, and as strong as if expressly given; and, as their agent, is, therefore, directly accountable to them for the money received under that agency, as money had and received to their use.

2. Defendant's ignorance of the real owner of the bill, and St. John's prior indebtedness to him, cannot affect plaintiffs' right to recover, unless, before notice of their claim, defendant had made advances to St. John, or delayed his prior claim against him, relying for reimbursement or payment on this fund.

St. John, in remitting the bill, did not state that plaintiffs were owners of it. He was indebted to defendant, who, on receiving its contents, credited him in account, and now claims

to retain the money of plaintiffs, in payment of the debt due to him by St. John.

The defendant's having passed the money, in account, cannot affect this question; *Buller* v. *Harrison*, Cowp., 565; *Coxe* v. *Prentice*, 3 Mau. & Sel., 348. Lord Ellenborough says, "I take it that an agent who receives money for his prin-
*767] cipal, is liable as a *principal so long as he stands in his original situation, and until there has been a change of circumstances," &c. &c.

This money is, therefore, to be considered as in the hands of defendant, without any disposition having been made of it. Defendant's want of knowledge that the money belonged to the plaintiffs, cannot affect their right after notice and proof of their title. *De Valengin's Adm'r.* v. *Duffy*, 14 Pet., 282, 290. This was a case where money was received by an administrator, as property belonging to his intestate, though it belonged in fact to another. The court said, that "the want of knowledge, or the possession of knowledge, on the part of the administrator, as to the rights or claims of other persons, on the money thus received, cannot alter the rights of the party to whom it is ultimately due."

Something more is necessary to enable a sub-agent to retain for his general balance against his immediate employer, than his mere want of knowledge of the real principal. Story on Agency, §§ 389, 390, pp. 481, 483, and the authorities there cited. The lien exists for advances made, and (as it seems) for his general balance. But why? The reason is given. It is the presumption that the advances were made, or the demand delayed, relying on the credit of the fund allowed to remain in his hands. No advances were made in this case. Defendant did not rely on this fund for the payment of his demand. He did not delay it. That demand was prior, and had been secured to the satisfaction of defendant by a pledge of bank stock.

When St. John failed, and the security became (as is to be presumed) inadequate, then, for the first time, defendant looked to this fund, but he had undertaken the agency without any such reliance. The presumption is, therefore, negatived by the facts of the case; *The Bank Metrop.* v. *New England Bank*, 1 How., 234. This will probably be relied on. The court held:

1. That the paper in question continued the property of the New England Bank, notwithstanding the endorsement, these having been made to enable the agent to collect.

2. That a long course of dealing and repeated settlements in conformity to it, in which the parties were mutually credited

with the proceeds of bills remitted by them, balances being suffered to remain, until they were reduced by the proceeds of bills and notes deposited, made this case the same in principle as if money had been advanced on the paper deposited.

The court said there was no difference in principles between an advance of money, and a balance suffered to remain upon the faith of these mutual dealings.

The case under consideration is unaccompanied by any of these circumstances. Here there was no advance made, or demand delayed in reliance upon this fund; or any course of dealing and usage founded upon it, by which balances were suffered to remain *undrawn for, looking to reimbursement from the proceeds of bills or notes to be collected, which would be deemed equivalent, as in that case, to advances actually made. [*768

Nelson, (attorney-general,) for the defendant.

The bill was drawn by Holcombe on Mills, accepted by Mills, and endorsed by Holcombe, and sent to Augusta for collection. All that was necessary was for St. John to endorse it in blank, but he endorsed it specially to Smith. In this state of the case, whose agent was Smith? to whom would he have written to give information of the payment or non-payment of the bill? Certainly to St. John, who would have compelled him to pay over the money. A defence by Smith, that he was not the proper person to be paid, would not have been listened to. A sub-agent can be created, and in this case Smith must have been the agent of St. John. The question of agency must settle that of privity of contract. Story Agency, 395 to 400, where the subject is discussed.

An agent is responsible only to his employer. Paley Agency, 48; 1 Liverm. Agency, 64, 65, 66; 6 Taunt., 148; 1 Ves., 291, 292; where a son was employed as sub-agent by his father, who was agent, and it was held that the son could not be an accounting party to the owner of the mine, because there was no privity. 14 East, 582; 1 Crompt. & J., 83; 3 Barn. & Ad., 354; 4 Id., 375; 2 Campb., 123.

It is said, by the other side, that usage must govern. This is admitted. But what usage or facts does the record show? Not that Smith was a factor or broker, but only that he was a creditor of St. John. The court cannot presume usage, and there is nothing in the record to show it.

What are the respective equities of the parties? The action for money had and received is analogous to a bill in equity. Suppose that the bill had belonged to St. John, could he have

claimed to receive the amount of it whilst he was a debtor? The creditor had a right to apply the fund to pay himself. It is admitted that if Smith had forborne to press St. John for the amount of this debt, he would have a right to retain the amount of this bill. But the plaintiff, by his acts, has been the cause of lulling Smith into a false security. Story, 483, 484.

Where a party may be supposed to rely on a particular security, it is enough. Case of *New England Bank*, 1 How., 234.

The death of St. John does not defeat the lien. Story on Agency, 378 to 388, authorities collected.

It is a general rule, that where a factor holds property as his own, the real owner cannot come in and claim, where third persons are concerned, having claims upon the agent. 5 Taunt., 56; 2 Bell Com., §§ 807 to 812; Chit. Com. L., 544, 545, 546; 2 Bell. Com., 789 to 806.

*769] **Berrien*, in reply.

The controversy here is not about general principles, but their application. The cases in Taunton and 6 Vesey establish, that between a sub-agent and principal there is no privity. I do not deny the existence of the general rule which these cases support, but say that there are exceptions to the rule, of which this is one. (Mr. *Berrien* here examined the cases.) One of the exceptions is, where it is manifest that some other person would be employed.

As to the equities of the parties. Shall the defendant retain money which confessedly belongs to the plaintiff, when the position of the defendant has undergone no change in consequence of getting this money? If his circumstances had been changed upon this account, I have conceded that he could retain it. Smith could not have been lulled into a false security, because the statement affirms that no new transaction happened. St. John, therefore, could not have received a fresh advance. The case of the *New England Bank* was decided upon the ground that there had been "mutual and extensive dealings;" that they "did not draw;" and that these things were like an "actual advance." Strike these facts out of the case, and it would not have been decided as it was, but would then have resembled ours. Here is an insulated transaction, without any evidence of advance or forbearance.

Mr. Chief Justice TANEY delivered the opinion of the court.

We think the question certified has been settled by the

decision of this court, and that it is unnecessary to go into an examination of the English laws which were cited in the argument. It is admitted that the bill was the property of the plaintiff, and was transmitted to St. John, at Augusta, for collection, and by him transmitted to the defendant, at Savannah, where the drawer resided; and that no consideration was paid for the bill, either by the defendant or St. John. According to the usual course of dealing among merchants, the transmission of the paper to St. John gave him an implied authority to send it for collection to a sub-agent at Savannah, for it could not have been expected by the plaintiff that St. John was to go there in person, either to procure the acceptance of the bill, or to receive the money, nor could St. John have so understood it. So far, therefore, as the question of privity is concerned, the case before us is precisely the same with that of the *Bank of the Metropolis* v. *The New England Bank*, 1 How., 234. In that case, the bills upon which the money had been received by the plaintiff in error, were the property of the New England Bank, and had been placed by it in the hands of the Commonwealth Bank for collection, and were transmitted by the last mentioned bank to the Bank of the Metropolis, in Washington, where the bills were payable. And upon referring to the case, it will be seen that the court entertained no doubt of the right of the New England Bank to maintain the action *for money [*770 had and received, against the Bank of the Metropolis; and the difficulty in the way of its recovery in the action was not a want of privity, but arose from the right of the Bank of the Metropolis to retain, under the circumstances stated in the case, for its general balance against the Commonwealth Bank. In that case, as in the present, the agent transmitting the paper appeared, by the indorsements upon it, to be the real owner, and the party to whom it was transmitted had no notice to the contrary, and the money received was credited to the Commonwealth Bank. We think the rule very clearly established, that whenever, by express agreement between the parties, a sub-agent is to be employed by the agent to receive money for the principal, or where an authority to do so may fairly be implied from the usual course of trade, or the nature of the transaction, the principal may treat the sub-agent as his agent, and when he has received the money, may recover it in an action for money had and received.

Another question has been raised in the argument, that is, whether the defendant has a right to retain on account of the money due to him from St. John? As this point has not been certified, it is not regularly before the court, yet as it has been

fully argued on both sides, and evidently arises in the case, it seems proper to express our opinion upon it, as it may save the parties from further litigation and expense.

Upon this part of the case, as well as upon the question certified, we think the case of the *Bank of the Metropolis* v. *The New England Bank*, decisive against the defendant. It appears from the statement that he made no advances, and gave no new credit to St. John on account of this bill. He merely passed it to his credit in account. Now if St. John had owed him nothing, upon the principles we have already stated, the plaintiff would be entitled to recover the money; and we see no reason why he should be barred of his action because St. John was debtor to the defendant, since the case shows that he incurred no new responsibility upon the faith of this bill, and his transactions with St. John remained in all respects the same as they would have been if this bill had never been transmitted to him. In the case of the *Bank of the Metropolis* and the *New England Bank*, it appeared in evidence that there had for a long time been mutual dealings between these two banks, in the collection of money for each other, and that balances were suffered to remain and credit given upon the faith of the paper transmitted or expected to be received, according to the usual course of their business with one another. And the court held, that if credit had been so given, the party giving it had the same right to retain as if he had made an advance of money; the hazard he ran by the extension of the credit giving him as just and equitable a right to retain, as if he had incurred responsibility by an advance of money. The right to retain, in that case, *771] depended upon the fact that credit was given. But in *the case at bar this fact is expressly negatived, and there is no ground, therefore, upon which he can retain, according to the principles decided in the case referred to.

As this point, however, is not in strictness regularly before this court, we shall confine our answer to the question sent here for decision, and shall direct it to be certified to the Circuit Court, that there was such a privity of contract between the plaintiffs and defendant, as would enable the former to maintain the action for money had and received.

THOMAS B. WINSTON *v.* THE UNITED STATES.

Where the matter in dispute is below the amount necessary to give jurisdiction to this court, the writ of error must be dismissed, on motion.[1]

Nelson (attorney-general) moved to dismiss this case for want of jurisdiction, under the circumstances stated in the opinion of the court, which was delivered by

Mr. Chief Justice TANEY.

A motion has been made to dismiss the case for want of jurisdiction.

It appears that an action was brought by the United States against the plaintiff in error, in the District Court of the United States for the northern district of Mississippi, (the said court having the powers of a Circuit Court,) for the purpose of recovering damages against the plaintiff in error, who was a notary public, for having failed to give notice to the endorsers of a promissory note, put into his hands for protest, whereby the United States lost their remedy against them. The note was for $537.27, and the damages in the declaration laid at one thousand dollars. There was a verdict and judgment for the sum of $750.36, and it is upon this judgment that the writ of error is brought.

The matter in dispute is below the amount necessary to give jurisdiction to this court, and the writ of error must therefore be dismissed.

HUGH ROSS, ADMINISTRATOR OF HIRAM PRATT, DECEASED, APPELLANT, *v.* WILLIAM PRENTISS, MARSHAL, DEFENDANT.

Where a bill was filed on the equity side of the court below, to enjoin the marshal from levying an execution upon certain property, which execution was for a less sum than two thousand dollars, an appeal from a decree dismissing the bill will not lie to this court, although the entire value of the property may be more than two thousand dollars.

The jurisdiction of the court does not depend upon the amount of any contingent loss or damage which one of the parties may sustain by a decision against him, but upon the amount in dispute between them.

[1] CITED. *Merrill* v. *Petty*, 16 Wall., 345.

*It was moved by *Nelson* (attorney-general) to dismiss the case for want of jurisdiction, under the circumstances stated in the opinion of the court, which was delivered by

Mr. Chief Justice TANEY.

It appears from the record in this case that a bill in chancery was filed in the Circuit Court for the district of Illinois, by the appellant against the appellee, who was the marshal for that district, stating among other things that the United States had recovered a judgment in the District Court for the district of Illinois, against one John S. C. Hagan and Gholson Kirchenal, for the sum of $600 damages, and $35.25 costs, upon which an execution had been issued, directed to the said marshal, who had levied it upon a certain lot of land and premises described in the bill, upon which the complainant, as administrator as aforesaid, held a mortgage to a large amount mentioned in the bill, and which he was then proceeding to foreclose; and averring that the said property was not chargeable with the said judgment, and that he was in danger of losing the benefit of his mortgage, by a sale under the execution, and praying that the marshal might be enjoined from making such sale.

Upon this bill an injunction was granted, and the appellee afterwards put in his answer, and the cause was proceeded in until a final hearing, when the injunction was dissolved and the bill dismissed.

It is unnecessary to state more particularly the character of the controversy, because the case now comes before us on a motion to dismiss, upon the ground that the matter in dispute is not sufficient in amount to give jurisdiction to this court.

The motion is resisted by the appellant, who insists that the jurisdiction depends on the value of the property upon which the execution has been laid, and the amount of the appellant's interest in it. And as the property is worth much more than the sum required to give jurisdiction, and the mortgage also for a larger amount, he has a right to appeal to this court from the decree of the Circuit Court; because, as he allows, he may lose the whole benefit of his mortgage by a forced sale under the execution.

We think otherwise. The only matter in controversy between the parties is the amount claimed on the execution. The dispute is whether the property in question is liable to be charged with it or not. The jurisdiction does not depend upon the amount of any contingent loss or damage which one of the parties may sustain by a decision against him, but upon the amount in dispute between them; and as that amount is

in this case below two thousand dollars, the appeal must be dismissed.

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*THE UNITED STATES, PLAINTIFF IN ERROR, *v.* RICHARD KING AND DANIEL W. COXE, DEFENDANTS.[1] [*773

The certificate of survey alleged to have been given by Trudeau, on the 14th of June, 1797, and brought forward to sustain a grant to the Marquis de Maison Rouge, declared ante-dated and fraudulent.

The circumstance that a copy of this paper was delivered by the Spanish authorities in 1803, is not sufficient to prevent its authenticity from being impeached.

Leaving this certificate out of the case, the instruments executed by the Baron de Carondelet in 1795 and 1797, have not the aid of any authentic survey to ascertain and fix the limits of the land, and to determine its location.[2]

This court has repeatedly decided, and in cases too where the instrument contained clear words of grant, that if the description was vague and indefinite, and there was no official survey to give it a certain location, it could create no right of private property in any particular parcel of land, which could be maintained in a court of justice.[3]

An equitable title is no defence in a suit brought by the United States. An imperfect title derived from Spain, before the cession, cannot be supported against a party claiming under a grant from the United States.[4]

The act of Congress of the 29th April, 1816, confirming the grant to the extent of a league square, restricted it to that quantity, and cannot be construed as confirming the residue.

Query: Whether the acceptance, by the claimant, of this league square, affected his title to the residue.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for East Louisiana.

It involved a claim for upwards of two hundred thousand arpens of land in Western Louisiana, commonly known as the Maison Rouge claim, the history of which is this:

About the year 1795, a number of French royalists arrived in New Orleans, and amongst them the Marquis de Maison Rouge, a knight of St. Louis, who had been banished from France, and whose property had been confiscated in the Revolution.

On the 1st of January, 1795, he obtained the following passport:

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[1] See *United States* v. *King*, 7 How., 833, *n.* (1).

[2] FOLLOWED. *United States* v. *Philadelphia and New Orleans*, 11 How., 853; *United States* v. *Turner*, Id., 664. CITED. *Doe* v. *Eslava*, 9 How., 448; *Doe* v. *City of Mobile*, Id., 469.

[3] FOLLOWED. *Magwire* v. *Tyler*, 8 Wall, 660; *D'Auterive* v. *United States*, 11 Otto, 707.

[4] APPLIED. *Un'ed States* v. *Hughes*, 11 How., 568. CITED. *Fremont* v. *United States*, 17 How., 576; *Tyler* v. *Magwire*, 17 Wall., 280.

"The Baron de Carondelet, knight of the religion of St. John, brigadier of the royal armies, governor vice-patron of the provinces of Louisiana, West Florida, and inspector of the troops thereof, &c., &c.

"It is hereby permitted Messrs. De Maison Rouge, De Breard, and other persons of their suite, to pass on to Ouachita, to examine its position, and there to form a settlement. In consequence, Mr. de Filhiol will afford them every assistance, and the information necessary for that object.

"Given in our government-house, at New Orleans, this 1st day of January, one thousand seven hundred and ninety-five.

"Signed, THE BARON DE CARONDELET,
ANDREW LOPEZ ARMESTO."

On the 17th of March, 1795, the following contract was entered into:

[*774 * "We, Francis Lewis Hector, Baron de Carondelet, knight of Malta, brigadier-general of the royal armies of his Catholic majesty, military and civil governor of the provinces of Louisiana and West Florida; Don Francis Rendon, intendant of the army and deputy superintendent of the royal domains in the said provinces; Don Joseph de Orue, knight of the royal and distinguished order of Charles Third, principal accountant for the royal chests of this army, exercising the functions of fiscal of the royal domains, declare, that we agree and contract with the Senior Marquis de Maison Rouge, an emigrant French knight, who has arrived in this capital from the United States, to propose to us to bring into these provinces thirty families, who are also emigrants, and who are to descend the Ohio, for the purpose of forming an establishment with them on the lands bordering upon the Washita, designed principally for the culture of wheat and the erection of mills for manufacturing flour, under the following conditions:

"1. We offer, in the name of his Catholic majesty, whom God preserve, to pay out of the royal treasury two hundred dollars to every family composed of two white persons fit for agriculture, or for the arts useful and necessary for this establishment, as house or ship-carpenters, blacksmiths and locksmiths, and four hundred dollars to those having four laborers; and in the same way, one hundred to those having no more than one useful laborer or artificer, as before described, with his family.

"2. At the same time, we promise, under the auspices of our

sovereign monarch, to assist them forward from New Madrid to Washita, with a skillful guide, and the provisions necessary for them till their arrival at their place of destination.

"3. The expenses of transportation of their baggage and implements of labor which shall come by sea to this capital shall be paid on account of the royal domains, and they shall be taken on the same account from this place to the Washita: provided, that the weight shall not exceed three thousand pounds for each family.

"4. There shall be granted to every family containing two white persons fit for agriculture ten arpens of land, extending back forty arpens, and increasing in the same proportion to those which shall contain a greater number of white cultivators.

"5. Lastly, it shall be permitted to the families to bring or to cause to come with them European servants, who shall bind themselves to their service for six or more years, under the express condition that, if they have families, they shall have a right, after their term of service is expired, to receive grants of land, proportioned in the same manner to their numbers. Thus we promise, as we have here stated, and that it may come to the knowledge of those families which propose to transport themselves hither, we sign the present contract with the aforesaid Senior Marquis de Maison Rouge, to *whom, that it may be made plain, a certified copy shall be furnished. [*775

"Signed, THE BARON DE CARONDELET.
FRANCIS RENDON.
JOSEPH DE ORUE.
THE MARQUIS DE MAISON ROUGE.

"*New Orleans, the 17th of March*, 1795."

On the 14th of July, 1795, this contract was approved by the king as follows:

"Having laid before the king what you have made known in your letter of the 25th of April last, No. 44, relative to the contract entered into with the Marquis of Maison Rouge for the establishment on the Washita of thirty families of farmers, destined to cultivate wheat for the supply of these provinces, his majesty, considering the advantages which it promises, compared with the preceding, has been pleased to approve it in all its parts.

"By his royal direction, I communicate it to you for your information. God preserve you many years.

"Signed, GARDOGORI.

"*Madrid*, 14*th of July*, 1795.

"The Intendant of Louisiana."

On the 12th of August, 1795, the following letter was addressed to the Marquis de Maison Rouge:

"*New Orleans, August* 12, 1795.

"SIR:—I have received the honor of your letter of the 25th June last, with a statement of the families. Your perseverance, in the opinion you have formed of the excellence of the lands you inhabit, and which you are going to make flourish for the happiness of this province, as well as for those in its neighborhood which ought to partake of these advantages, ought to animate you to make the greatest efforts to effect its early accomplishment. The picture you draw of these enchanted places convinces me of the solidity of your judgment, and of the fortunate selection you have made in your plan, as well as of the facility of means to carry it into execution in all its branches.

"I have paid Mr. Merieult the $300 for Alexander Laurent, Peter Relè, and James Fèret.

"By this opportunity, I inform the commandant of what is to be done when any new family arrives—giving him distinctly to understand that, if the least formality or a certificate is wanting, and not conformable to the copy which I send him, no payment whatever will be made from the royal treasury.

"I have the honor to be, with respect, sir, your very humble and most obedient servant,

"Signed, FRANCISCO RENDON.

"Mr. De Maison Rouge."

*776] *On the 26th of August, 1796, the following letter was written:

"Under this date, I have written to the commandant, John Filhiol, as follows:

"By the certificates which you sent me in behalf of the individuals who were brought here lately by the Chevalier Breard, I learn that there were among them many single men, who cannot, therefore, be considered as composing families, and, consequently, they ought not to have received the $100 stipulated in the 1st article of the contract which the Marquis of Maison Rouge made with the governor and intendant of this province. On this occasion, we passed over this irregularity in order to avoid disputes in future, it being inconsistent with the spirit of the contract, and of no use to the interests of the king, to spend the public money on individuals who, having no inducements to remain in the country, could leave it with the same facility they came. It must not occur again: and inform the Marquis that there are no funds

in the public treasury destined to that object; and that as soon as he has completed the number of thirty families which he contracted for, nothing will be paid out of the royal treasury to any who should exceed that number, and who wish to come and establish themselves in this district; and you will consider yourself instructed to this effect, and conform to it in future, advising me in conformity of what is done in the premises. I consider you as the agent, and authorized to act for the Marquis of Maison Rouge, in the business of bringing families to that post, and, therefore, communicate this for your government and information. The Lord preserve you many years.

"Signed, JUAN VENTURE MORALES.

"To Mr. Augustus de Breard.

"*New Orleans, 26th August*, 1796."

On the 14th of June, 1797, it was alleged that Trudeau, the surveyor-general, issued the following certificate:

"Figurative plan of the thirty leagues of superfices of land granted to the Marquis of Maison Rouge, not including the lands held by anterior titles.

"Don Carlos Trudeau, surveyor-general and particular of the province of Louisiana.

"I certify in behalf of the Marquis of Maison Rouge, that the plats of land represented and sketched in the foregoing plan of vermilion color, may contain thirty superficial leagues, to wit: the first plat marked No. 1, on the right bank of the river Ouachita, commencing or starting five arpens below the mouth of the bayou Cheniere au Tondre till it reaches the bayou Calumet, with the depth necessary to complete or produce one hundred and forty thousand superficial arpens. The second plat marked No. 2, on the left bank of the same river Ouachita, to start or begin two leagues below the Fort Miro at *the point called Laine, till it reaches the [*777 prairie de Lee, with the necessary depth to complete or produce sixty thousand arpens superficial. The third plat marked No. 3, to start in front of the bayou de la Loutre, and from thence on a line running south sixty-five degrees east to the bayou Siar, which line the bayou Siar and bayou Barthelemy, and the Ouachita bound said plat No. 3 and the plat No. 4, on the right bank of the Ouachita, to start in front of the entrance of bayou Barthelemy, running down the river till it reaches the bayou la Loutre; which plats Nos. 3 and 4, with the corresponding or necessary depth, are to complete eight thousand three hundred and forty-four superficial arpens, and, added to the plats Nos. 1 and 2, form together the superficial total of

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two hundred and eight thousand three hundred and forty-four superficial arpens, equal to the foregoing thirty leagues, at the rate of two thousand five hundred toises or fathoms per side for each league, which is the agrarian measure of this province; it being well understood that the lands included in the foregoing plats, which are held by titles in form, or by virtue of a fresh decree of commission, are not to compose a part of the foregoing thirty leagues; on the contrary, the Marquis of Maison Rouge promises not to injure any of the said occupants, promising to maintain and support them in all their rights, since, if it should happen that the said thirty leagues should suffer any diminution of the land occupied, there will be no objection or inconvenience to the said Marquis of Maison Rouge's completing or making up the deficiency in any other place where there are vacant lands, and to the satisfaction of the concerned.

"And in order that it may so appear or be made patent, I give the present, with the preceding figurative plan, formed or drawn by order of the governor-general, the Baron de Carondelet, to which faith is to be given this 14th of June, one thousand seven hundred and ninety-seven.

"Signed, CARLOS TRUDEAU.

"Noted in book A."

On the 20th of June, 1797, the following grant was issued:

"The Baron de Carondelet, knight of the order of St. John, marshal de camp of the royal armies, governor-general, vice patron of the provinces of Louisiana and West Florida, inspector of troops, &c.

"Forasmuch as the Marquis de Maison Rouge is near completing the establishment of the Washita, which he was authorized to make for thirty families, by the royal order of July 14, 1795, and, desirous to remove, for the future, all doubt respecting other families or new colonists who may come to establish themselves, we destine and appropriate conclusively for the establishment of the aforesaid Marquis de Maison Rouge, by virtue of the powers granted to us by the king, the *778] thirty superficial leagues marked in the plan annexed *to the head of this instrument, with the limits and boundaries designated, with our approbation, by the surveyor-general Don Carlos Lareau Trudeau, under the terms and conditions stipulated and contracted for by the said Marquis de Maison Rouge.

"And that it may at all times stand good, we give the present, signed with our hand, sealed with our seal at arms, and

countersigned by the underwritten honorary commissary of war and secretary of his majesty for this commandancy general.

"Signed, THE BARON DE CARONDELET.
ANDRES LOPEZ ARMESTO.

"*New Orleans, the 20th of June*, 1797.

"NOTE.—That in conformity with his contract, the Marquis de Maison Rouge is not to admit or establish any American in the lands included in his grant.

"Signed, THE BARON DE CARONDELET."

In the latter part of the year 1799, Maison Rouge died, leaving a will, which was dated on the 26th of August, in that year. It was as follows:

"*First.*—Recommending my soul to the same Lord God who gave it to me, and created and redeemed it at the price of his most precious blood, passion, and death, I implore him by the most holy bowels of his divine mercy, that he will pardon it and send it to eternal rest among the chosen, for which it was created.

"My body I order to be placed in the earth, out of which it was made; and when I die, I desire to be buried in the plainest manner, and that my funeral shall take place in such place as my executor chooses, to whom I leave the management of the rest of my funeral and interment, in order that he may act as to him appears best—such being my will and pleasure.

"I also direct that three masses be said for the rest and repose of my soul, for each of which three bits or rials shall be paid once, and to each of the donations into which my goods and effects are divided.

"I also declare that I am a bachelor, that it may so be made manifest and certain. I also declare and make known that I possess property in Paris, Berry, and Querry, which was confiscated, of which I possess no documents to establish my claim.

"I also declare that I possess in Ouachita, a house and land, which I give and bequeath to my servant-maid, called Maria, an Irish woman—such being my wish and pleasure.

"I also declare that I owe some small sums to my work people, which I desire to be paid from the present harvest.

"I also name as my executor and property holder Mr. Louis Bouligny, whom I empower and give authority to, after my death, to take possession of my goods and property, without the intervention or interference of judicial proceedings; to

*make inventories, valuations, and sales thereof; to appoint such appraisers as he chooses, and to adopt all necessary proceedings until my mortuary affairs are concluded and wound up; for which purpose, I postpone and extend the year of executorship, and further time which may be necessary for that purpose; and such is my will and pleasure.

"I also declare that I have, at the house of Don Pedro, all the articles necessary to build a saw-mill for cutting plank, and a pump auger.

"I also desire and declare that, in the donation which by this will I make to my servant-maid Maria of a house and land, there is only included five acres front, by the usual depth, and the aforesaid house, and not the rest, or other land; such being my will and pleasure.

"And the residue and remainder of my goods, rights, and actions, as well within as out of this province, in case my parents are dead, I constitute and name, for my sole and universal heir, the aforesaid Louis Bouligny, in order that, after my decease, he may have and inherit them, with the blessing of God and myself; and such is my will and pleasure.

"I revoke and annul, and declare void, cancelled, of no value nor effect whatever, any other wills and testamentary dispositions I may have heretofore made by word, or in writing, which I desire no faith or value shall be attached to, saving and excepting this, which I at present authorize and declare in such manner and form as may stand good and right.

"In faith of which, this instrument is dated in the city of New Orleans, the 26th of August, one thousand seven hundred and ninety-nine.

"I, the notary, give faith to and know the declarer, who, to appearance, possesses his natural judgment, memory, and understanding, and signed it in the presence of Don Andres Lopez de Armesto, honorary commissary of war and secretary of this government, Dn. Pedro Gondillo, and Dn. Vizente Texeiro Lientard, inhabitants.

"De Maison Rouge."

In 1802, Bouligny went upon the ground and caused a survey to be made by McLaughlin, who had been a deputy-surveyor under Trudeau.

In 1803, Daniel Clarke applied for and obtained from the intendant-general of New Orleans copies of the contract with Maison Rouge, and of the order of the 14th July, 1795.

Congress having passed an act for the purpose of ascertaining the rights of persons to land within the district and terri-

tory of New Orleans, the commissioners appointed under that act reported upon Bouligny's claim as follows:

*" *Claims to land in the county of Washita.* [*780

	Reported No.	Register's No.	By whom claimed.	Original proprietor or claimant.	Quantity claimed.	Nature and date of title or claim.	Class
	* *	* *	* *	* *	* *	* *	*
Extract B.	16	11	Louis Bouligny.	Marquis de Maison Rouge.	30 square leagues.	Spanish grant 20th June, 1797.	B.
	* *	* *	* *	* *	* *	* *	*

Class B, in which the claim was placed by the commissioners, is thus described by them.

To the second class, comprising "claims which, though not embraced by the provisions of the said acts, ought, nevertheless, in the opinion of the commissioners, to be confirmed in conformity with the laws, usages, and customs of the Spanish government," the letter B will be affixed.

By an act of the 29th April, 1816, the claims marked B were confirmed: "provided, nevertheless, that under no one claim shall any person or persons be entitled under this act to more than the quantity contained in a league square."

In 1841, the defendant Coxe, who had become owner of this claim, applied for patents for a league square, which were accordingly given him, under the circumstances stated in the opinion of the late Mr. Attorney-General Legaré, under date of 22d December, 1841.

On the 13th of February, 1843, the United States, by Bailie Peyton, their attorney, filed a petition in the Circuit Court of the United States, stating that Richard King had taken possession of, and claimed title to, a part of the land. The petition prayed that the land might be adjudged to belong to the United States, &c., &c.

King answered and called Coxe in warranty, who also answered and set forth his title *in extenso* under the grant to Maison Rouge.

On the 10th of July, 1843, the court, after argument, pronounced the following decree:

"The court having maturely considered the law and the

evidence in this case, doth now order, adjudge and decree, that the plaintiff's petition be dismissed, and that the grant made by the Baron de Carondelet, as the governor of Louisiana, on the 20th June, 1797, to the Marquis de Maison Rouge, be and the same is hereby declared valid; that the said Richard King, the defendant, and the said Daniel W. Coxe, warrantor, be and they are hereby declared and recognized to be the lawful owners of the parts of the said grant held by
*781] them, as described in the answer of the said Richard King, *and in the schedule 'A,' and that they be quieted in the ownership and possession of the same.

"Signed, THEO. H. MCCALEB, U. S. Judge."

In the course of the trial, the United States filed five, and the defendants three bills of exceptions. The following were assigned as errors on the part of the United States.

1. That in the matters stated in the several bills of exception, not necessary here to be re-stated, the court below committed error.

2. That the evidence in the cause does not sustain the claim of title of the defendants to the lands in controversy.

3. That the acceptance by the defendant Daniel W. Coxe, of a patent for one league square of said land, under the act of Congress of the 29th April, 1816, operates as an extinguishment of his title to any other portion of said land.

The evidence referred to in the second point of error was very voluminous. It consisted of a number of letters written by the Baron de Carondelet, by the Marquis de Maison Rouge, and by others, and of the deposition of sundry persons; all of which it is impossible to insert at length or to compress within a reasonable compass.

Nelson, (attorney-general) for the United States.
Coxe, for the defendants.

Nelson, after referring to and explaining the papers above cited, laid down four propositions which he proposed to maintain.

1. That the paper relied upon by the defendants is not a grant.

2. That assuming it to be so, it was to take effect upon conditions which were not complied with.

3. That the paper purporting to be a survey by Trudeau is a forgery, and covers land not covered by the grant.

4. That the grant is void from indefiniteness, and cannot be located. (As the decision of the court turns upon one of

these points only, it is deemed unnecessary to report the arguments of the respective counsel upon the other points.)

3. That the paper purported to be a survey is a forgery; and, apart from that paper, the grant contains no description.

It is remarkable that no one ever saw this survey, although professing to have been made in 1797, until 1803. It was not appended to the grant. In 1802 there was a grant by Trudeau to Filhiol, of land below Fort Miro, and yet the survey, made in 1797, calls for Filhiol's line which was not established until 1802.

Moreover, this grant to Filhiol says that his land is bounded on every side by vacant lands, and yet if the former survey were genuine, Filhiol's grant was in the midst of land which had been granted to Maison Rouge.

(Mr. *Nelson* then examined minutely the testimony of various *persons; of Mr. Filhiol, the commandant of [*782
the post of Washita, from 1783 to 1800; of the widow Bayergeon; of Mr. Pomier, a settler under the contract; of Mr. Belin; of Mr. McLaughlin, who said that Trudeau was never on the spot, and never had any other deputy-surveyor than himself.)

In 1802, Bouligny went out to the spot and had a plat made by McLaughlin, who says, that the "plat dated 14th June, 1797, is copied" from the one which he made in 1802.

Coxe, for defendants, gave a history of the case, and referred to various state papers: Report of a Committee, Senate U. S., July 20, 1842; Instructions of Solicitor of the Treasury, December 28, 1842; 2 American State Papers, June 9, 1818; Land Laws, 744, 745; 3 Greene's Public Lands, 247.

In 1 Laws U. S., Brown's edition, 549, this title is set out just as it is in the present record.

In 2 Land Laws, (American State Papers,) 771, 774, there is a copy of the very plat which we have.

It is objected that no one ever saw Trudeau's certificate of survey until 1803. At the foot of the grant, in Spanish, which is in the record, are these words: "Anotado en el libro A, No. 1, vergo 38, y copia sicada."

What became of the book A, we do not know.

In American State Papers, Public Lands, vol. 2, page 774, there is a translation of Trudeau's certificate of survey, with the following remark:

"*Land-office, Opelousa, Aug.* 15, 1812.

"The foregoing is the substance of the *procès verbal*, (cer-

tificate,) of the surveyor-general, subjoined to the plat, (of which the annexed is a copy,) filed in the claim of Louis Bouligny, holding under Maison Rouge.

"S. SCHACIRE, Translator to the Commissioners.
L. POSEY, Clerk of the Board."

If there is any defect in the record, the government must bear the consequences, for all the Spanish books were handed over to the public authorities. It is the first time that this paper was ever denounced as a forgery. The grant itself says, "Marked in the plan annexed," showing that some plan was annexed to it. The evidence of Tessier verifies it. He was a principal clerk in the office for making grants of land under the Spanish government, and this grant is in his handwriting. He says he "cannot recollect whether he had or had not Trudeau's figurative plan and *procès verbal* before him, but he is certain that he performed his duty, either by dictation or written instructions of his superiors, or by seeing the document B, though he cannot say in which of the three respective modes he acted upon this occasion."

*783] *The decision of the board of commissioners is final against the United States. In the case of *McDonogh* v. *Millaudon*, decided at this term, the court say that a complete grant requires no confirmation by Congress. The limit to a league square in the confirmatory act does not negative the residue of the title; there are no words to that effect. The proviso was put in because it was thought that Spanish governors could not grant more than a league square. This court entertained the same doubt. 4 Pet., 511.

Congress could not annul the title to the land beyond a league square, because it rested on a treaty. The act does not profess to annul it, but leaves it where it found it, subject to judicial decision. This construction of the act reconciles it with justice and good faith, and these considerations were held to be operative in 2 Wheat., 203, 6 Pet., 718. The United States never claimed what was severed from the public domain. Our title, therefore, is equal to a patent, and can only be assailed on the ground of fraud. This is a charge which is easily made. It is not pretended that any was practised on Carondelet, nor is the signature of Trudeau denied, but it is said to be ante-dated. The United States knew all about these papers, but the petition in this case does not allege fraud. It is true that the defendants are said to have no title. But suppose we were in chancery, would the court permit a party to raise such a question upon the trial if it was not alleged in the bill? It ought to have been put in issue

and evidence taken upon it, and in that case the *onus probandi* would have been upon the United States. By the treaty they became possessed of all vacant domain and must make out their title. It will not do to claim all and make the defendant show his title. 9 Pet., 298; 2 Burchard's Land Laws, 669.

The fraud here is charged upon high functionaries of a foreign government forty-eight years ago. Fraud, for what purpose? There was no motive for it. Carondelet might have made the grant if he chose; he had the power to do it. Both these papers were before Congress in 1820, and the defendant met the accusations which were then brought against them. The United States have never attempted to rescind this patent for twenty years. If they were a private person, they would be bound by their acts. The accusation of fraud now made by the attorney-general rests on two grounds:

1. A pamphlet published by Giraud.
2. On evidence taken in another suit.

With regard to the pamphlet, it has been answered in the same way. With regard to the other, the evidence was taken under a notice served by a hostile party before another hostile party, all on the same day, and the suit then prosecuted.

(Mr. *Coxe* then examined this testimony.)

Nelson, in reply and conclusion.

This is a mere question of title, to be settled on principles of law. *The defendant claims under a grant [*784
from the Spanish government. The treaty gave the public domain to the United States. There is no contest about their title, if the land had not previously been granted by Spain. We concede freely that the United States only succeeded to the rights of Spain, and that all grants, perfect or imperfect, are binding. If the rights were imperfect, the United States are bound in equity to carry them out; but not this branch of the government, which can look only at the legal title. Is this such?

But first let us examine a proposition laid down by the other side, that this claim has been recognized by all the departments of the government. If so, the United States must be estopped. If Congress has conferred a title on the representatives of Maison Rouge, there is an end of the question. So, if the judiciary has recognized it. But no misapprehension of the executive on such a subject is binding on this court.

(Mr. *Nelson* here examined the papers and documents cited by Mr. *Coxe*.)

The laws requiring commissioners to report to Congress, cannot be construed as erecting them into a judicial tribunal whose decisions should be final.

The alleged legislative confirmation is equally defective.

(Mr. *Nelson* here referred to 2 Story, 1410, 1429.)

The executive department of the government has always resisted this claim from 1804. It offered the lands for sale, but withdrew them on account of the dispute. A survey had to be made to ascertain what was unclaimed.

There has been no regulation by any branch of the government, but the question is entirely open for this court.

It is said that no fraud was alleged in the court below. That is very true. But it would have been odd, if the United States, when instituting a proceeding similar to an ejectment, had gone on in their declaration to say that the title of the defendant was fraudulent.

It is also said that we have no right to supervise the action of the Spanish authorities. This is true, if they are *bona fide*, but not if they are fraudulent. Congress has always provided, in its laws, for cases of fraud. The fraud was concocted in 1802, after Carondelet had gone away.

It is true that a great part of the testimony was taken in another case; but it was introduced into this by consent, and the defendant must abide by it.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case is one of great importance, from the amount of property in dispute; and if the court entertained any doubt upon the questions of law or of fact which are presented by the record, we should regard it as our duty to hold it under advisement, and postpone the decision to another term. But
*785] the principles of law upon which it *depends are not new in this court, and have often been the subjects of discussion and consideration since the cession of Louisiana and Florida to the United States. And having, after a careful examination of the evidence, formed a decided opinion upon the facts in the case, we deem it proper to dispose of it without further delay.

The claim in question arises upon two instruments of writing, executed by the Baron de Carondelet, civil governor of Louisiana; one in 1795, and the other in 1797; the latter of which is alleged, by the defendant in error, to be a grant to

the Marquis de Maison Rouge, for the land included in a plat made out by Trudeau, the surveyor-general of the province, and dated the 14th of June, 1797, and which survey embraces the land in controversy. It is insisted, on the part of the United States, that this certificate of Trudeau is antedated and fraudulent; and in order to determine the state of the facts upon which the questions of law will arise, the authenticity of this survey will be the first subject of inquiry.

Upon this point, a good deal of testimony has been taken upon both sides. But it would extend this opinion to an unreasonable and unnecessary length, to enter upon a minute comparison and analysis of the testimony of the different witnesses, and of the other evidence contained in the record. It is sufficient to say, that, after an attentive scrutiny and collation of the whole testimony, we think it is perfectly clear that this certificate of Trudeau is antedated and fraudulent, and we refer to the evidence of Filhiol, McLaughlin, and Pomier, as establishing conclusively that the actual survey upon which this certificate was made out, did not take place until December, 1802, and January, 1803; and that the one referred to by the governor, in the paper of 1797, was for land in a different place, and higher up the Washita river. We are entirely convinced that the survey now produced was not made in the lifetime of the Marquis de Maison Rouge, who died in 1799, but after his death, and at the instance of Louis Bouligny, who, according to the laws of Louisiana, was what is there termed the forced heir of the marquis; and that it was made in anticipation and expectation of the cession of the country to the United States; the negotiations upon that subject being then actually pending, and the treaty of cession signed on the 30th day of April, 1803. We see no reason to doubt the truth of the witnesses to whom we have referred. On the contrary, they are supported by the testimony of other witnesses, and by various circumstances detailed in the record.

It has, however, been argued that, inasmuch as an attested copy of this certificate, with the two instruments executed by the Baron de Carondelet, were delivered to Daniel Clarke, in August, 1803, by the Spanish authorities at New Orleans, upon his application for the documentary proofs of the title to this land, the authenticity of the paper in question ought not to be impeached; and that it is inconsistent with the comity due to the officers of a foreign government, * to impute to them fraud, or connivance in a fraud, in an official act where their conduct has not been questioned by the authority under which they were acting, and to which they [*786

were responsible. This proposition is undoubtedly true, where no other interest is concerned except that of their own government or its citizens. And as regards the interest of others, the acts of the officer, in the line of his duty, will *prima facie* be considered as performed honestly, and in good faith. And although this certificate and the other documents were delivered to Clarke after the country had been ceded to the United States, yet as possession had not been taken, and the evidences of titles to lands in the ceded province were still lawfully in the hands of the Spanish authorities, the documents upon that subject, obtained from the proper officer, ought to be regarded as genuine, unless impeached by other testimony; and to that extent this court is bound to respect the certificate in question. But it would be pushing the comity usually extended to the tribunals and officers of a foreign government, beyond the bounds of justice and the usages of nations, to claim for them a total exemption from inquiry, when their acts affect the rights of another nation or its citizens. Certainly, the political department of this government has never acknowledged this immunity from inquiry, now claimed for the Spanish tribunals and officers; and in every law establishing American tribunals to examine into the validity of titles to land in Louisiana and Florida, derived from the government of Spain, they are expressly enjoined to inquire whether the documents produced in support of the claim are antedated or fraudulent; and we have no doubt that it is the right of this court to hear and determine whether the certificate of Trudeau, although recognized and sanctioned by the colonial authorities of Spain, is antedated and made out either with or without their privity and consent, in order to defraud the United States, and to deprive them of lands which rightfully belonged to them under the treaty; and that it is our duty to deal with it as the evidence may require. We desire, however, to be understood, when speaking upon this subject, as not intending to charge the present claimants with having participated in the fraud; but from the testimony in the record, we are fully convinced that it was committed in the manner hereinbefore mentioned, by Bouligny, under whom they claim title.

Regarding the case in this point of view, the right of the defendant in error must stand altogether upon the instruments executed in 1795 and 1797, by the Baron de Carondelet; and it has not the aid of any authentic survey, to ascertain and fix the limits of the land, and to determine its location. The instruments themselves contain no lines or bounda-

ries, whereby any definite and specific parcel of land was severed from the public domain; and it has been settled, by repeated decisions in this court, and in cases, too, where the instrument contained clear words of grant, that if the description was *vague and indefinite, as in the case [*787 before us, and there was no official survey to give it a certain location, it could create no right of private property in any particular parcel of land, which could be maintained in a court of justice. It was so held in the cases reported in 15 Pet., 184, 215, 275, 319, and in 16 Id., 159, 160. After such repeated decisions upon the subject, all affirming the same doctrine, the question cannot be considered as an open one in this court. Putting aside, therefore, and rejecting the certificate of Trudeau, for the reasons before stated, the instruments in question, even if they could be construed as grants, conveyed no title to the Marquis de Maison Rouge for the land in question, and, consequently, the defendants in error can derive none from him. The land claimed was not severed from the public domain, by the Spanish authorities, and set apart as private property, and, consequently, it passed to the United States, by the treaty which ceded to them all the public and unappropriated lands.[1] It is unnecessary, therefore, for the decision of the case, to say anything in relation to the construction and effect of these two instruments, or the purposes for which they were intended.

As relates to the claim of an equitable title arising from the number of immigrants alleged to have been introduced under these instruments, it would not avail the defendant in error in this action, even if the proofs showed a performance equal to that contended for on his part. For if these instruments were regarded as grants, and it appeared that the Marquis de Maison Rouge had originally selected this very district as the place where the grant was intended to be located; and the immigrants introduced by him had been settled upon it in performance of the conditions of his contract; and if it should be held that he had thereby acquired an equitable right to have the quantity of land mentioned in the paper of 1797 laid off to him at this place, still it would be no defence against the United States. For in the case of *Choteau* v. *Eckhart*, 2 How., 375, this court decided that an imperfect title derived from Spain, before the cession, would not be supported against a party claiming under a grant from the United States, unless it had been confirmed by act of Congress. The same point

[1] APPROVED. *Lecompt* v. *United States*, 11 How., 127.

was again fully considered and decided, at the present term, in the case of *Hickey and others* v. *Stewart and others*.[1] These decisions stand upon the ground that such titles are not confirmed by the treaty itself so as to bring them within judicial cognisance and authority; and that it rests with the political department of the government to determine how and by what tribunals justice should be done to persons claiming such rights. If, therefore, this controversy was in a court of equity, and no suspicion of fraud rested upon the claim, yet it could not be supported against a grantee of the United States, because Congress has not confirmed it, nor authorized any other tribunal to determine upon its validity. This case, however, is in a court of law; the petitory action
*788] brought *by the United States in the Circuit Court of Louisiana, being in the nature of an action of ejectment in which the decision must depend on the legal title; and that title under the treaty of cession being in the United States, an equitable title, if the defendant in error could show one, would be no defence.

It has indeed been urged in the argument, that the act of April 29, 1816, § 1, (3 Story Laws, 1604,) confirmed this grant to the claimants to its whole extent. Upon this point we do not think it necessary to go into a particular and minute examination of the acts of Congress upon this subject, nor indeed of the act referred to. Because the provision in this act, that the confirmation shall extend only to the quantity of land contained in a league square, is in the judgment of the court too clear and unambiguous to admit of serious controversy. The restriction of the confirmation to the quantity above mentioned, appears to be as plainly stated in the proviso as language could make it; and Congress certainly, in a claim of this description, addressing itself to the political power, had a right to confirm a portion of the claim, and at the same time, to refuse to give the claimant a title to the residue, if they supposed it just to do so.

Another question of more difficulty arises under this act of Congress, but as it has not been pressed in the argument, we forbear to express an opinion upon it. It appears that the claimant has accepted a patent for a league square. In similar cases in Florida, the act of Congress upon that subject provided, that the patent for the quantity confirmed should not issue unless the claimant released all title to the residue. The law in relation to the land in question does not, it is true, require this release, and the patent was issued and accepted

[1] *Ante*, p. 750.

under an understanding with the commissioner of the General Land-office, that the acceptance should not prejudice the claim to the residue. Yet it is a question worthy of serious consideration, how far the acceptance of the land proffered by Congress, even under these circumstances, must affect any title to the residue, which the party might be supposed to have had, and ought to influence the judgment of the court where the fact appears in the record. It is unnecessary, however, to pursue the inquiry, since for the reasons before stated, the judgment of the Circuit Court must be reversed.

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APPENDIX.

From circumstances which it is not necessary to explain to the public, the two following dissenting opinions of Mr. Justice McLEAN, in the cases of *Kendall* v. *Stokes*, p. 87, and *The United States* v. *Gear*, p. 121, have been omitted from their proper places, and are here inserted.

AMOS KENDALL
v.
STOKES ET AL.

Mr. Justice McLEAN.

THIS case is a writ of error. The facts and merits of the case are before us only so far as they are connected with the legal points raised by the bills of exceptions. I will consider these points, and not indulge in a course of remarks which could only be proper on a motion for a new trial.

Before taking up the exceptions, I will observe, that from the finding of the jury the defendant below was acquitted of all malice with which he stands charged in the declaration. And I will add that there is nothing in the record inconsistent with the inference, that he acted from a sense of duty, and with a desire to advance the public service.

The second, third, and fourth counts in the declaration were discontinued, so that the judgment was entered on the first and fifth counts.

The first count states, that the plaintiffs were contractors for the transportation of the mail of the United States under William T. Barry, then postmaster-general, and that for services so rendered the said postmaster-general caused credits to be entered in their accounts on the books of the department for the sum of one hundred and twenty-two thousand dollars. The defendant below was appointed to succeed William T. Barry in the office of postmaster-general, and that he wrongfully, &c., caused the above sum of money, which had been paid to the plaintiffs as aforesaid, to be suspended on the books of the department and to be charged as a debit against them; by reason whereof the plaintiffs were unable to obtain from the department moneys under their several contracts for the transportation of the mail, which subjected them to great losses in raising funds to enable them to carry on their contracts; that their credit was destroyed, and that they were

obliged to incur great expense in obtaining payment of the above sum, &c.

The fifth count claims damages for the refusal of the postmaster-general to credit them with the amount of the award of the solicitor of the Treasury, as by the act of Congress he was required to do; by reason whereof they were kept out of the money for a long space of time, and were subjected to expensive litigations, &c.

*790] *The first exception, by the defendant below, that I shall consider, is as follows: "That the acts of defendant, as postmaster-general, in suspending the allowances mentioned in the two letters from P. S. Loughborough, as treasurer, both dated 14th May, 1835, the one addressed to Messrs. Stockton & Stokes, the other to L. W. Stockton, and above given in evidence by plaintiffs, and in continually holding the same under suspension and refusing to credit or pay the same till the rendition of the solicitor's award, above given in evidence by plaintiffs, were not such as laid him liable to the plaintiffs in the right in which they now sue, to the aforesaid action, and that upon the evidence so as aforesaid produced and given on the part of the plaintiffs, they are not entitled to maintain this action on their said first, second, and third counts, of their amended declaration."

As the second and third counts of the declaration were discontinued, no reference can be had to them in considering the legal questions in the case.

The court properly refused to give the last clause of the above instruction, on the ground that it requested them to determine the effect of the evidence. This has been so often decided by this court, that no reference to authority is deemed necessary. The other part of the exception goes to the capacity in which the plaintiffs sue as partners.

The contracts under which they sue were made in the name of Richard C. Stockton, but they were made for the benefit of the plaintiffs equally, as jointly interested with Stockton. When the contracts were about being executed, the postmaster-general was informed that all the plaintiffs were interested in them; and inquiry was made of him whether the contracts made in the name of Richard C. Stockton would inure to the benefit of all concerned. The reply was, that they would; and with that understanding the contracts were signed.

The duties under the contracts were apportioned among the parties. From this state of facts, the question arises, whether the plaintiffs having a joint interest in the contracts may not sue as partners. They made the contracts in the name of

Richard C. Stockton, and can there be any doubt of their right thus to make them? In this view the others are not sub-contractors under Stockton, but are jointly interested with him in the contracts. And if any thing has been done to render the head of the department liable to Richard C. Stockton, his associates being jointly interested with him are proper parties in the action for damages. The action is not on the written contracts, but by those interested in them for a wrong done. No subdivisions of the labor among the partners can affect this question. I can have no doubt as to the right of the plaintiffs to sustain this action, if there be a ground for any action. The Circuit Court, therefore, in my judgment, did not err in refusing the above instruction.

*The evidence of O. B. Brown, a clerk in the department, to show the interest of the plaintiffs, is objected [*791
to, on the ground that parol evidence cannot be heard, to contradict a written agreement. How this applies in the present case, it is difficult to perceive. Brown does not contradict the written contracts, but swears that the plaintiffs made them with the department in the name of Richard C. Stockton. And this evidence was admissible, on the ground that where any association of individuals bind themselves by a particular name or designation, in a written contract, in an action by or against the persons thus bound, the facts may be shown by parol.

The practice which prevails in this district, of praying the court for instructions on the close of the plaintiff's evidence, is a most inconvenient one, and can answer no other purpose than to introduce confusion in the case, and perplex the jury. In this case, there were two prayers for instructions on the evidence of the plaintiffs, as regards the capacity in which they sue; and a similar instruction is again asked after the close of the defendant's evidence. These instructions are founded upon the evidence, and are substantially the same, though expressed in different words.

The third instruction asked by the defendant in the court below, will be considered in connection with the second one prayed, after all the evidence had been heard.

The fourth instruction refused by the Circuit Court, was, "that the evidence so as aforesaid produced and given, on the part of the plaintiffs, so far as the same is competent to sustain any count in the declaration, is not competent and sufficient to be left to the jury, as evidence of any act or acts done or omitted, or refused to be done by defendant, which legally laid him liable to the plaintiffs in this action, under

such count, for the consequential damages claimed by plaintiff in such count."

This instruction goes only to the admissibility of the evidence. The question would have been more properly raised by a motion to overrule the evidence. But viewing it as an instruction, it prays the court to instruct the jury that the facts proved are not competent and sufficient; not to prove the right of the plaintiffs to recover, but to be left to the jury, "as evidence of any act or acts done or omitted, or refused to be done by defendant," &c.

No particular facts proved are alleged to be incompetent evidence, and the court, consequently, could not give the instruction, provided there was any legal evidence before the jury, which conduced to sustain the plaintiffs' right under any one of the counts in their declaration.

That the above instruction should be mistaken by any one as a demurrer to evidence, is, to me, very extraordinary.

A demurrer to evidence withdraws it from the jury, but this instruction calls upon the court to say whether "the evi-
*792] dence was competent to be considered by the jury." The instruction is not in *form or effect like a demurrer to evidence. It was nothing more nor less than an objection to the admissibility of the evidence.

The fifth instruction prayed is, as to the capacity in which the plaintiffs sue, and which I have already considered.

I now come to the instructions prayed by the defendant below after the close of his evidence.

The first one, being substantially of the character of the fifth, above stated, will not be examined.

The second instruction was, "if the jury find, from the said evidence, that the defendant, as postmaster-general, acted in the premises from a conviction that he had the lawful power and authority as such postmaster-general, to set aside the extra allowances, as claimed under the allowance of his predecessor, and to suspend and recharge the same, and from a conviction that it was his official duty to do so; and if plaintiffs suffered no oppression, injury, or damage, from such official act of the defendant, but the inconveniences necessarily resulting from such official act, then he is not liable to plaintiffs in this action for having so set aside, suspended, and recharged such extra allowances."

The principle imbodied in this instruction is this: if an executive officer do an act in good faith, and, as he believes, within his power, he is not responsible for an injury done to an individual.

It will require but little reflection to show, that the

proposition, to the extent here stated, is unsustainable. The principle is made to depend, not upon the character of the act or its consequences, but on the intent with which it was done. Now there are many duties of an executive officer which are purely ministerial, and others which are discharged under prescribed limitations. It is inconsistent with the nature of our institutions, that an irresponsible power should be exercised by any public agent. Every officer, from the highest to the lowest, in our government, is amenable to the laws for an injury done to individuals. An act which the law sanctions cannot be considered as injurious to any one. And where a discretion may be exercised, if it be exercised in good faith, the officer is not responsible for an error of judgment. But this, of necessity, is limited to matters which come within his jurisdiction. He can claim no immunity beyond this. If he could, he might act without any other restraint than his own discretion; and this would be to exercise an unmitigated and irresponsible despotism.

If a member of this court should imprison a citizen, for causes over which the law gave him no jurisdiction, he would be responsible for damages in an action at law. And it is supposed that no higher immunity can be claimed by an executive officer. It is a fundamental principle in our government, that no individual, whether in office or out of office, is above the law. In this our safety consists.

Of all the powers exercised by the departments of this government, *those of the executive are the most extensive and the most summary. They have not the forms and the deliberations of a judicial procedure. Hence it is of the utmost importance that the executive power should be defined and guarded by law. From the nature of these duties, an enlarged discretion is indispensable; and with the exercise of this discretion no other power can interpose, and no legal responsibility results from its rightful exercise. But this is not an unlimited discretion. If its boundaries be not specifically defined by statutory enactments, yet they are found in the thing done, and in the well-established principles of private right. The courts are often called on to exercise their discretion, but it must be a legal discretion. The same rule applies, where individual rights are involved, to every executive officer. [*793

A postmaster-general, by the terms of every mail contract, on the happening of certain failures by the contractor, may forfeit it. But if he shall arbitrarily annul the contract, when by the terms of it he had no power to do so, he is unquestionably responsible to the party injured. And in such a

case, the plea that he acted in good faith and with a desire to discharge his duty, would not avail him. He is presumed to be acquainted with his duties, and the powers he may exercise. A contrary presumption would suppose him to be unqualified to discharge the duties of his office. It therefore follows, when a public officer does an act to the injury of an individual, which did not come within the exercise of his discretion, and was clearly not within the powers with which he is invested by law, he may be held legally responsible.

In the first count of the declaration, the plaintiffs charge that the defendant not only refused to pay to them the sum of $122,000, which under their contracts they had earned, and which had been credited to them in their accounts; but that he caused that sum to be recharged to them, which represented them, on the books of the department, as defaulters, &c.

Now, had he power to do this? As this point has been expressly adjudged by this court, I need refer to no other authority.

In the case of the *United States* v. *Bank of Metropolis*, 15 Pet., 400, the court say, "The third instruction asked the court to say, among other things, if the credits given by Mr. Barry were for extra allowances which the postmaster-general was not legally authorized to allow, then it was the duty of the present postmaster-general to disallow such items of credit;" and to this instruction this court answer: "The successor of Mr. Barry had the same power, and no more, than his predecessor, and the power of the former did not extend to the recall of credits or allowances made by Mr. Barry, if he acted within the scope of official authority given by law to the head of the department. This right in an incumbent of reviewing a predecessor's decisions, extends to mistakes in matters of fact arising from errors of calculation, and in cases of rejected claims in which *material testimony is afterwards discovered and produced. But if a credit has been given or an allowance made, as these were, by the head of a department, and it is alleged to be an illegal allowance, the judicial tribunals of the country must be resorted to, to construe the law under which the allowance was made, and to settle the rights between the United States and the party to whom the credit was given. It is no longer a case between the correctness of one officer's judgment and that of his successor."

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The point here ruled is, in every respect, the point under consideration. And the decision is clear and unequivocal against the power of the postmaster-general to supervise the allowances and contracts of his predecessor. And more

especially must this be the case, where the allowances have not only been made for services rendered, but credited to the party on the books of the department.

On the ground of fraud or mistake, a postmaster-general may suspend or annul the acts of his predecessor. But in such a case the ground should be set up as matter of justification. No such defence has been made in the present case.

Here is an act done by the defendant, as postmaster-general, which this court say he had no power to do. And as a consequence of that act great injury has been done to the plaintiffs, as alleged in the declaration, shown by the evidence and sanctioned by the verdict of the jury. And here the question arises whether the act so complained of subjects the defendant to an action at law. My brethren think it does not; I have come to a different conclusion.

In stating the grounds of my opinion, I acquit the postmaster-general of all improper intention. And I not only do this, but I am willing to admit, that the circumstances under which he acted were such as to require from him great vigilance and firmness. He acted too under the sanction of the President, and in accordance with the opinion of the attorney-general. These precautionary measures go to explain his action, and show that whatever damages might have been incurred by the plaintiffs and recovered by them, the defendant should be indemnified by the government. He should no more be subjected to loss in this respect than a collector of the customs who, under the instructions of the Treasury Department, collects an illegal duty upon goods imported, which subjects him to a judgment for damages.

But if the right of action exist, these circumstances cannot destroy it. They create a clear case of indemnity by the government, but they do not lessen nor excuse the injurious consequences to the plaintiffs.

There are three grounds on which a public officer may be held responsible to an injured party.

1. Where he refuses to do a ministerial act, over which he can exercise no discretion.

*2. Where he does an act which is clearly not within his jurisdiction. [*795

3. Where he acts wilfully, maliciously, and unjustly, in a case within his jurisdiction.

The first position is sustained by this court in the case of *Kendall* v. *The United States*, 12 Pet., 613. Speaking of the act required by the law, to be done by the postmaster-general, the court say, "It is a precise definite act, purely ministerial; and about which the postmaster-general had no discretion

whatever." And again, in 612, they say, "The plaintiff's right to the full amount of the credit, according to the report of the solicitor, having been ascertained and fixed by law, the enforcement of that right falls properly within judicial cognisance." In page 614, they say, "It is seldom that a private action at law will afford an adequate remedy," where the damages are large. The act required to be done was, that the postmaster-general should cause a credit to be entered on the books of the department in favor of the plaintiffs below, for a certain sum. "His refusal to do this subjected him to an action." This decision then sustains the position, that a public officer is liable to an action for damages sustained, for refusing or neglecting to do a mere ministerial act, over which he could exercise no discretion.

In the case of *Ferguson* v. *Earl of Kinnoull*, 9 Cl. & F., 279, a decision in the House of Lords, in 1842, the lord chancellor said, "When a person has an important public duty to perform, he is bound to perform that duty; and if he neglects or refuses so to do, and an individual in consequence sustains injury, that lays the foundation for an action to recover damages by way of compensation for the injury he has so sustained." And he cites *Sutton* v. *Johnston*, 1 T. R., 493. His lordship further remarks, "A party had applied to a justice of the peace to take his examination under the statute of Elizabeth, the statute of hue and cry; the justice had refused to do this, and the party had in consequence sustained injury, because he was deprived of his right of bringing a suit against the hundred in consequence of that neglect. It was held, upon the principle I have stated, that he was entitled to recover damages against the justice for the neglect of his public duty; he having in consequence sustained a personal injury." *Green* v. *Bucklechurches*, 1 Leon., 323, c. 456. He states another case, of *Stirling* v. *Turner*. "Stirling was a candidate for the office of bridgemaster; the mayor refused to take a poll, in consequence of which he brought an action against him, and it was held that that action might be sustained to recover damage for the injury. Upon what principle? That it was the duty of the Lord Mayor to take the poll; that he neglected that duty; that the party in consequence sustained injury, and it was therefore held that the action might be maintained."

In his opinion Lord Brougham says, page 289, "Courts of
*796] justice, *that is, the superior courts, courts of general jurisdiction, are not answerable, either as bodies, or by their individual members, for acts done within the limits of their jurisdiction. Even inferior courts, provided the law has

clothed them with judicial functions, are not answerable for errors of judgment; and where they may not act as judges, but only have a discretion confided to them, an erroneous exercise of that discretion, however plain the miscarriage may be, and however injurious its consequences, they shall not answer for. This follows from the very nature of the thing; it is implied in the nature of judicial authority. But where the law neither confers judicial power, nor any discretion at all, but requires certain things to be done, every body, whatever be its name, and whatever other functions of a judicial or of a discretionary nature it may have, is bound to obey; and with the exception of the legislature and its branches, every body is liable for the consequences of disobedience."

Lord Cottenham said, "I feel much satisfaction at finding that this case has been so deeply considered and so fully discussed by the noble and learned lords who have preceded me. I concur in the opinions which they have stated."

Lord Campbell said, "Where there is a ministerial act to be done by persons who, on other occasions, act judicially, the refusal to do the ministerial act is equally actionable as if no judicial functions were on any occasion intrusted to them. There seems no reason why the refusal to do a ministerial act by a person who has certain judicial functions, should not subject him to an action, in the same manner as he is liable to an action for an act beyond his jurisdiction. The refusal to do the ministerial act is as little within the scope of his functions as judge, as the act where his jurisdiction is exceeded. In the act beyond his jurisdiction, he has ceased to be a judge."

And the House of Lords, without a dissenting voice, affirmed, on the above principles, the judgment.

2. An officer is liable where he does an act injurious to another, which is clearly not within his jurisdiction.

In the case of *Tracy et al.* v. *Swartwout*, 10 Pet. 95, this court say, "It would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights, and unsupported by law, should afford no ground for legal redress. The facts of the case under consideration will forcibly illustrate this principle. The importers offer to comply with the law by giving bond for the lawful rate of duties; but the collector demands a bond in a greater amount than the full value of the cargo. The bond is not given, and the property is lost, or its value greatly reduced in the hands of the defendant. Where a ministerial officer acts in good faith, for an injury done, he is not [*797
*liable to exemplary damages; but he can claim no further exemption where his acts are clearly against law."

In the language of Lord Campbell, above cited, "where a judge does an act, which is clearly beyond his jurisdiction, he ceases to be a judge." And if he cease to be a judge, all the immunities connected with his official character, as relates to the act, also cease.

The treasurer of the United States, in the exercise of his discretion, withholds the salary of a judicial or other officer, on the ground that such officer has not faithfully discharged his duties. Now this is a matter about which the treasurer can exercise no discretion. He is, therefore, liable to an action. And on this principle, any and every officer may be made responsible for injuries done to another.

3. That an officer is liable where he acts wilfully, maliciously, and unjustly in a case within his jurisdiction, would seem to result from the foregoing considerations. But, as there is no pretence that this action is to be maintained on this ground, I shall not consider it farther than to say, that the law is clear where the facts are established.

The third instruction prayed by the defendant, and refused by the court, is as follows: "If the jury, in addition to the facts above supposed in the last preceding form of instruction, further find, from said evidence, that the defendant, in refusing to credit plaintiffs with such parts of the solicitor's awards as he refused to credit them with as aforesaid, acted from a conviction that the solicitor had no lawful jurisdiction or authority to audit, settle, or adjust the claims or items of claims upon which he awarded the several sums of money, constituting the sum of what defendant refused to credit them with as aforesaid, and from a conviction that it was therefore his official duty to refuse to credit them with so much of the amount awarded by the solicitor as aforesaid; and if plaintiffs suffered no oppression, injury or damage, from such refusal of the defendant, but the inconvenience necessarily resulting thereupon, then he is not liable to plaintiffs in this action for such refusal."

This instruction, as the one preceding it, rests the liability of the defendant upon the intention with which the act was done; and consequently, however injurious it might have been to the plaintiffs, if done with a *bona fide* intent, they are without remedy. This principle has been examined under the preceding instruction, and nothing further need here be said, than that this court, in the mandamus case above cited, held that the act referred to in this instruction was ministerial; that the defendant had no discretion over it, but was bound to enter the credit under the act of Congress. And for not doing so, they held he was liable to an action.

The fourth instruction refused was, "that the defendant is not liable in this action for any of his said acts in the premises, if, in addition to the facts supposed in the two last preceding forms of *instruction, the jury believe, [*798 from the whole evidence, that he acted in the premises with the *bona fide* intention to perform duly the duties of his office, and without malice or intention to injure and oppress the plaintiffs."

The record shows no evidence of malice against the defendant below. His liability on other grounds has been already discussed.

The third and last bill of exceptions, was, "the plaintiffs, further to support the issues on their part, above joined, produced and offered evidence to prove their special expenses, losses, &c., in consequence of the defendant's acts in the premises, to wit, such expenses and losses as are set out in the papers annexed, marked A, B, C, D, (copied in pages 633–638;) and also their expenses and losses in the form of bank discounts, paid by Stockton and Stokes, on post-office acceptances, and interest paid by them on money borrowed from May 30th, 1835, to Nov. 9th, 1836, amounting to $9,749.14, a particular account whereof (being the same as the document 52, annexed to the solicitor's report above given in evidence by plaintiffs) they produced, as taken from the books of Stockton and Stokes, and proved that all the original entries in the said account were in the handwriting of one A. Matter, at that time the clerk who kept the said books, and has since deceased; and further evidence to prove that Stockton and Stokes were in good credit up to May, 1835, when said suspensions were made by order of the defendant, and that their credit was afterwards destroyed in consequence of such suspensions." To the admission of which evidence defendant objected, but the court overruled the objection. This objection goes to the entire evidence in the case. And although a part of that evidence thus objected to should have been overruled, if specially objected to; yet as the exception extended to other evidence clearly admissible, it was properly overruled. This point has been so often decided, and is, in itself, so evident, that I shall not cite any authority. The objection, to prevail, must always be limited to that part of the evidence offered, which is incompetent.

Does the mandamus suit bar this action? My brethren think it does; in my opinion it does not.

There is no plea in bar, and how the proceedings by mandamus can constitute a bar, without being pleaded, I am at a loss to determine. It is true, those proceedings were given in

evidence by the plaintiffs, to show what expense they had incurred, in prosecuting that suit, for the balance of the award, which should have been credited promptly by the postmaster-general. But how can this constitute a bar to this action?

What was the object of the mandamus; not to recover money, but to obtain an order from the court directing the postmaster-general to enter a credit to the plaintiffs for the balance of the award, on the books of the department. *799] And such an order was made by the *court, in pursuance of which the credit was given. The act of the 2d of July, 1836, referred the claims of the plaintiffs, against the Post-office Department, to the solicitor of the Treasury, who was authorized to make them "such allowances, therefore, as, upon a full examination of all the evidence, may seem right according to the principles of equity; and that the postmaster-general be, and he is hereby directed to credit the plaintiffs with whatever sum or sums of money, if any, the said solicitor shall so decide to be due to them, &c." The solicitor reported in favor of the plaintiffs $161,563.89, as the amount of principal and interest due to them by the department. Of this sum $122,101.46 were credited to the plaintiffs on the books of the department. But the postmaster-general refused to credit the balance, and for this cause the mandamus was brought.

Could the mandamus have been pleaded in bar of the present action? The objects of the two suits are entirely distinct. By the mandamus, a credit for the full amount of the sum awarded to the plaintiffs was sought. By the present action the plaintiffs seek to recover damages sustained by them, in their business as contractors for the transportation of the mail, by reason of the suspension of more than $120,000 which they had earned, and which had been allowed and credited to them by the predecessor of the defendant; but which the defendant had recharged against them. And also for the refusal to credit $39,000 of the award, as the law required.

Notwithstanding this suspension and refusal, the plaintiffs allege that they were required rigidly to perform their contracts with the department, which they did at a great expense and sacrifice; and that in the prosecution of their rights, they were subjected to great expense in employing counsel, loss of time, &c. This is the foundation of the present action. And it is only necessary to state it to show that the mandamus, if pleaded, could have been no bar. The two actions are distinct in their character and objects. and also in the evidence on which they rest. Interest was allowed to the plaintiffs for the sums of money withheld from them by the department;

but no allowance was made by the solicitor to the plaintiffs for the consequential damages sustained by them in the premises. The evidence acted upon by the solicitor, as stated in document 52, was before the jury, but the plaintiffs could claim no item which had been allowed by the solicitor. The sums allowed by the solicitor had been credited to the plaintiffs. Those sums, therefore, constituted no part of the present case. Still the document was proper evidence to prove the award of the solicitor, as a part of the proceedings in the mandamus case. Indeed the record in that case was properly received as evidence to show the delays and expenses to which the plaintiffs were subjected by the acts of the defendant.

It is said that in an action against the postmaster-general, the sum awarded might have been recovered, and also the damages claimed *in this action, if such damages constitute a legal right of action. And from this an argument is drawn in support of the position, that the mandamus suit bars the present action. The force of this argument is not perceived. For if the damages as above stated could have been recovered by an action against the postmaster-general, it does not follow that the same damages were recoverable by the mandamus. In fact no damages were recovered by the mandamus suit. It is true that that proceeding would bar an action on the award, as it procured a credit to be entered for the amount of the award. But the solicitor was not, by the act of Congress, authorized to inquire, and he did not inquire into any consequential damages suffered by the plaintiffs, beyond the interest on the sums suspended. And the present action is brought for the consequential injuries sustained by the plaintiffs, under the peculiar circumstances of the case. [*800

From this view it must be apparent that the mandamus suit, if technically pleaded, could be no bar to this action. The history of judicial proceedings, it is confidently believed, affords no similar bar to this, which has been sustained. Nor does the award constitute a bar, for the reason that the arbitrator did not allow, nor was he authorized by the law to allow, a single item which is claimed in the present action. All the items allowed by the arbitrator were before the jury, as they could not be separated from the proceedings in the mandamus case; but all those items were shown to have been credited to the plaintiffs, and, therefore, the plaintiffs could not insist that those items should be any ground of recovery in this action. To say, therefore, that the evidence in this action, on which the verdict was rendered, is the same as that in the mandamus suit, is, in my judgment, wholly unsus-

tained by the facts in the case. I think the judgment of the Circuit Court should be affirmed.

THE UNITED STATES
v.
H. H. GEAR.

Mr. Justice McLEAN.

I dissent from the opinion of the court.

The question certified, in my judgment, should be answered in the affirmative.

That it was the intention of Congress to sell, at public sale, the land in question, is clear, if that intention is to be ascertained by their own language. In the 4th section of the act of 26th of June, 1834, it is provided, "that the President shall be authorized, as soon as the surveys shall have been completed, to cause to be offered for sale, in the manner *801] prescribed by law, all the lands lying in said *land districts, at the land-offices in the respective districts in which the land so offered is embraced, reserving only section 16 in each township, the tract reserved for the village of Galena, such other tracts as have been granted to individuals and the state of Illinois, and such reservations as the President shall deem necessary to retain for military posts, any law of Congress heretofore existing to the contrary notwithstanding."

The land lies in one of the land districts above referred to, and is not within any one of the reservations named in the section. This being admitted, is there any ground to doubt that Congress authorized the President to sell all lands covered by the section and not reserved in it. They have said so expressly. The language of the section is so clear as to admit of no other construction. And it would seem to me that such must be our judgment, unless we can judicially say, that when Congress speak in the authoritative language of law, they do not mean what they say. Such a decision would constitute a new rule for the construction of statutes.

It is said that the land occupied by the defendant was reserved by the 5th section of the act of the 3d of March, 1807. This is admitted. But the question is, whether it was reserved by the act of 1834? The 5th section above referred to provides, "that the several lead mines in the Indiana territory, together with as many sections contiguous to each as shall be deemed necessary by the President of the United

States, shall be reserved for the future disposal of the United States; and any grant which may hereafter be made for a tract of land containing a lead mine which had been discovered previous to the purchase of such tract from the United States, shall be considered fraudulent and null." Now the tract in question had on it a lead mine, and, being then within the Indiana territory, of course came within the reservation just cited. But such reservation was made only "for the future disposal of the United States." And the act of 1834 does authorize the President to dispose of this and all other tracts in the districts named not specially reserved in that act. This latter act then, by consequence, repeals the act of 1807. In this respect the acts are repugnant. They cannot stand together. The first act reserves the land for the future disposal of the United States, and the last act disposes of it. The President is, undoubtedly, bound within a reasonable time, after the surveys were executed, to issue his proclamation offering for sale, at public auction, the lands in the above districts. And after such sales all the lands not sold or reserved were open for entry as the law provides. A failure of the President to execute a duty enjoined by law cannot affect any individual right involved in this case.

It is not doubted that if no other consequence resulted from the above construction of the act of 1834, than the mere authority of the President to sell the land, there would have been little or no diversity of opinion on the subject; but a pre-emptive right in the *defendant may follow such a [*802
construction, and this creates the difficulty in the case. But when the law is clear we should follow it, without regard to consequences.

In my judgment the pre-emptive right of the defendant, if he shall bring himself within the law, is as clear as that the President was authorized to sell the land.

By the 1st section of the act of 29th May, 1830, it is provided, "that every settler or occupant of the public lands prior to the passage of this act, who is now in possession, and cultivated any part thereof in the year 1829, shall be, and he is hereby authorized to enter, with the register of the Land-office for the district in which such lands may lie, by legal subdivisions, any number of acres, not more than one hundred and sixty, or a quarter-section, to include his improvement, upon paying to the United States the then minimum price of said land: Provided, however, that no entry or sale of any land shall be made, under the provisions of this act, which shall have been reserved for the use of the United States," &c.

By the act of the 19th of June, 1834, every settler prior to

the passage of that act, then in possession, and who cultivated any part of the land in 1833, was declared to be entitled to the benefit of the act of 1830, which act was continued in force two years. And by the act of the 22d of June, 1838, it is provided, that every actual settler of the public lands being the head of a family, or over twenty-one years of age, who was in possession and a housekeeper by personal residence thereon at the time of the passage of this act, and for four months next preceding, shall be entitled to all the benefits and privileges of the above act of the 29th May, 1830. And that act was declared to be in force two years. In the same section it was declared that said right should not extend "to any land specially occupied or reserved for town lots, or other purposes, by authority of the United States."

As the pre-emption act of the 19th of June, 1834, passed seven days before the act which authorized the President to sell the land in question, and as, prior to this latter act, the land was reserved from sale by the acts of 1807 and 1830, the pre-emption right may not have attached to the residence of the defendant. But if this be admitted, the act of 1807 having been repealed, as above shown, by the 4th section of the act of the 26th of June, 1834, there seems to me to be no doubt, that the pre-emption right did attach under the law of 1838. After the land was authorized to be sold, it could no longer be considered as reserved from sale by the act of 1807; and the act of 1838 only excepted from the right of pre-emption, such tracts as were at that time reserved by the authority of the United States. In this view, then, it would seem the right of pre-emption is in the defendant, if he were a resident on the land within the provisions of the act of 1838.

*803] It is said the law authorizing the sale of these lands and the pre-emption *laws, being all on the same subject, must be taken together, and so construed as to effectuate the intention of Congress. This is admitted. But does this rule of construction authorize the court to say, that where a subsequent law is repugnant to a prior one, they may both stand? It is impossible to give effect to both, as they are inconsistent. The truth of this is forcibly illustrated by the acts in question. By the 4th section of the act of 1807, the lead mines are reserved for the future disposal of the United States. By the 4th section of the act of 1834, these with all other lands, not specially reserved in that section, are authorized to be sold. It is true the lead mines are not named in the section as authorized to be sold, but they are not reserved from sale by it, and the authority to sell all other lands not reserved in the section necessarily includes them. Now how

are these two laws to stand together? The one reserves the lands for the future disposal of Congress, and the other disposes of them. Can effect be given to both of these laws? Can we say that this repugnancy does not necessarily repeal the act of 1807? A negative answer to this inquiry would add, as I think, a new principle to the construction of statutes. Instead of following the rule on this subject, which is obvious, sensible and just, we should involve ourselves in the mysteries and uncertainties of the alchemist.

It is said Congress did not intend to dispose of the lead mines and the lands adjacent thereto by the act in question. To this I answer, that I have no other mode of ascertaining the intention of Congress except by the plain and unequivocal language which they have used in the solemn form of law. Whether the lead mines were valuable or not, is not a matter of any importance in regard to a right construction of the act. We cannot go out of the law to ascertain what is meant by it. If it were proper to investigate the policy of reserving lead mines, salt springs and mill seats, for the benefit of the United States, it would not be difficult to show that they had not been a source of revenue to the United States. In most instances, it is believed, if not in all, the expenses of superintendencies have absorbed the profits.

The case of *Brown and Wife* v. *Hunt et al.*, decided at the present term, has a strong bearing upon the principles involved in this case.

It is contended that the main point in this case was decided in *Wilcox* v. *Jackson*, 13 Pet., 509. In my judgment, that decision has no bearing on the present question. Beaubean in that case set up a pre-emption right to the tract of land in controversy, having obtained from the register and receiver of the proper land-office a certificate sanctioning his right. But the government showed that the land had been reserved for a military post in 1804, and was occupied as such until, in 1812, during the late war, the fort was taken by the enemy and the troops were massacred. It was re-occupied in 1816, and from that time the government continued to occupy it [*804 *for a military post, as a trading establishment with the Indians and also for a light-house, which had been built upon the ground at an expenditure of five thousand dollars. This possession was continued by the government up to the time the pre-emption was claimed. But in addition to these facts, the 4th section of the act of 1834 specially reserved from sale such places "as the President shall deem necessary for military posts." So that here was not only an express reservation of the land from sale, in the above section, but a reservation

in fact was shown of more than thirty years, and a continued possession by the government.

Now, is there any similarity, as to the legal points, in the two cases? I can see none. It is true that Mr. Justice Barbour says, "We do not consider this law, (the act of 26th June, 1834,) as applying at all to the case. That has relation to a sale of lands in the manner prescribed by general law at public auction, whilst the claim to the land in question is founded on a right of pre-emption, and governed by different laws. The very act of the 19th of June, 1834, under which this claim is made, was passed but one week before the one of which we are now speaking; thus showing that the provisions of the one were not intended to have any effect upon the subject-matter on which the other operated. But we go further, and say, that whensoever a tract of land shall have been once legally appropriated to any purpose, from that moment the land appropriated becomes severed from the mass of public lands; and that no subsequent law, or proclamation, or sale, would be construed to embrace it, or to operate upon it; although no reservation were made of it."

But one of the points above stated was necessary to a decision of the case. The tract in question was reserved for a military post; and such reserves, by the 4th section of the act of 26th June, 1834, were excepted from the lands to be sold. Now, the reservation was fully proved by the evidence, and that, under the above section, ended the controversy. The remark, that the above act had no application to the case, was correct in the sense only that it had no application to affect injuriously the title of the government; and that, it is presumed, was the sense in which it was used by the judge. It is strictly true, as stated, that the pre-emption right set up was assumed to be derived under a different law. But the statement that the above act of 26th of June, 1834, could have no effect upon the pre-emption act which was passed on the 19th of the same month, was not in the case, was unauthorized, and is wholly unsustainable. It was not in the case, because the 4th section of the act of the 26th did reserve the land. No court can deliberately say, that an act which is wholly repugnant to a preceding act, does not repeal it. And it can be of no importance whether the preceding act had been passed seven days or seven years before the last act; the effect is the same.

*805] *There can be no doubt, that when a tract of land is appropriated for a military post, or for any other permanent object, it becomes separated from the mass of the public lands, and need not be specially reserved in the President's

proclamation for the sale of lands in the same district. And the illustration of Mr. Justice Barbour shows his meaning. "Thus, in the act of 26th June, 1834," he says, "there is expressly reserved from sale the land granted to individuals and the state of Illinois." "If such lands were sold," says the judge, "could the purchasers hold them? Certainly they could not. Having been previously granted by the United States, the second grant would be void."

But what is the case now under consideration? There was no appropriation of the lead mines, of a permanent character, which separated them from the mass of the public lands. "They were reserved for the future disposal, by the United States." And, as has been shown, the act of the 26th June, 1834, authorized the President to sell them. This, then, if there be any meaning in language, was a disposal of them within the act of 1807, by which they were reserved.

There seems to be an impression that pre-emption rights are without merit, and that the acts under which they arise should receive a strict construction. In my judgment, the acts granting these rights are remedial in their nature and policy, and should be so construed as to effectuate the intention of Congress. It is a right arising under the statute, and must, of course, be brought within it. But the policy of the statute was a benign one, and it was founded upon a meritorious consideration. That legislation which tends to make every citizen a freeholder cannot be unwise or impolitic.

This opinion has been submitted to Mr. Justice STORY, and Mr. Justice MCKINLEY, who have authorized me to say, that it coincides with their own views on the subject.

PROCEEDINGS OF COURT

HAD UPON THE

DEATH OF JUDGE BALDWIN.

At the opening of the Court this morning, Mr. Nelson, the Attorney-General of the U. S., addressed the Court as follows:

"I have been requested, this morning, to present to your Honors, a series of resolutions, adopted yesterday, at a meeting of the members of the Bar, and other officers, connected with this tribunal, evincive of their admiration of the character, and respect for the memory of the Hon. Henry Baldwin, late an Associate Justice of this Court.

"In acquitting myself of this melancholy duty, I cannot forbear the expression of my sincere concurrence in all that my brethren have testified of the distinguished merits of the deceased, with whose friendship, originating in an intimate association in the popular branch of the national Legislature, I have for years been honored.

"I have known him—as we all knew and appreciated him—as frank, generous, and benevolent, as a man; and as pure, and profound, and independent, as a judge; and whilst the resolutions, which I hold in my hand, evidence the consideration, in which his illustrious services, political and judicial, covering more than thirty years of the history of this confederacy, are held by those who have adopted them, I am sure that I shall not be regarded as presumptuous, in assuming, that they equally won for him the esteem, confidence, and affection of his brethren on the bench.

"In this assurance, I now present these resolutions to your Honors, which, after they shall have been read, I respectfully move may be entered on the minutes of your proceedings."

"At a meeting of the Members of the Bar of the Supreme Court of the United States, and of the Officers of the Court, at the Court room in the Capitol, on the 3d day of Dec'r, A. D. 1844,

"The Honorable James Buchanan was called to the chair, and the Honorable William L. Dayton appointed Secretary.

"The following resolutions were submitted by the Honorable Joseph R. Ingersoll, and unanimously adopted:—

"Resolved, That the Supreme Court of the United States, and the country, have sustained, in the death of the Honorable HENRY BALDWIN, a loss of extensive learning, indefatigable industry, pure integrity, and sterling abilities: a long and laborious practice at the Bar had prepared and disciplined his mind for the severer studies and more responsible duties of the Bench, and he has left to the Profession lasting proofs how faithfully he pursued the one, and how actively he discharged the other.

"Resolved, That this meeting sincerely laments Judge BALDWIN's decease, in the midst of a career of active usefulness; and that the members of this Bar, and Officers of this Court, will wear the usual badge of mourning during the residue of the term.

"Resolved, that the chairman and secretary transmit a copy of these proceedings to the family of the deceased, and assure them of our sincere condolence, on account of the great loss they have sustained.

"Resolved, That the Attorney-General be requested to move the Court that these resolutions be entered in the minutes of their proceedings.

"JAS. BUCHANAN, Chairman.

"WM. L. DAYTON, Secretary."

To which Chief Justice TANEY replied as follows:—

"The Court very sincerely unite with the Bar, in the testimony of respect proposed to be offered to the memory of our departed brother. We have at the present term, as at the last, assembled together under painful circumstances; and are again called upon to deplore the loss of one, who for many years was associated with us in the labors of the Court; and whose great learning commanded the confidence of all who had an opportunity of knowing him. He was indeed full of the learning of the law; strikingly familiar with its records and decisions, in ancient as well as modern times; and perhaps scarcely any one can fully appreciate his high claims to respect, unless, like ourselves, he had often met him in the calm discussion of the conference room, and heard him from time to time discussing the various, abstruse and difficult questions which are continually arising. We sincerely feel his loss, and deeply deplore it; and shall direct these proceedings to be entered on the records of the Court, as evidence of the respect and regard which we all entertained for him."

Dec'r 4th.

INDEX

TO THE

MATTERS CONTAINED IN THIS VOLUME.

The references are to the STAR (*) pages.

ADMIRALTY.

1. An agreement of consortship between the masters of two vessels engaged in the business known by the name of wrecking, is a contract capable of being enforced in an admiralty court, against property or proceeds in the custody of the court. *Andrews* v. *Wall et al.*, 568.
2. The case of *Ramsay* v. *Allegre*, 12 Wheat., 611, commented on, and explained. *Ib.*
3. Such an agreement extends to the owners and crews, and is not merely personal between the masters. *Ib.*
4. If made for an indefinite period, it does not expire with the mere removal of one of the masters from his vessel, but continues until dissolved upon due notice to the adverse party. *Ib.*
5. Where there is no other evidence than the answer of its having been a part of the original agreement, that such removal should dissolve the contract, the evidence is not sufficient. *Ib.*
6. Whenever proceeds are rightfully in the possession and custody of the admiralty, it is an inherent incident to the jurisdiction of that court to entertain supplemental suits by the parties in interest to ascertain to whom those proceeds rightfully belong, and to deliver them over to the parties who establish the lawful ownership thereof. *Ib.*

APPEAL.

1. After a case has been decided upon its merits, and remanded to the court below, if it is again brought up on a second appeal, it is then too late to allege that the court had not jurisdiction to try the first appeal. *Washington Bridge Co.* v. *Stewart*, 413.
2. The Supreme Court has no power to review its decisions, whether in a case at law or in equity. A final decree in chancery is as conclusive as a judgment at law. *Ib.*
3. An affirmance by a divided court, either upon a writ of error or appeal, is conclusive upon the rights of the parties. *Ib.*
4. Where this court has affirmed the title to lands in Florida, and referred, in its decree, to a particular survey, it would not be proper for the court below to open the case for a re-hearing, for the purpose of adopting another survey. *Chaires* v. *United States*, 611.
5. The court below can only execute the mandate of this court. It has no authority to disturb the decree, and can only settle what remains to be done. *Ib.*

ASSIGNMENT.

1. The legal title to stock held in corporations situated in Louisiana, does not pass under a general assignment of property, until the transfer is completed in the mode pointed out by the laws of Louisiana, regulating those corporations. *Black* v. *Zacharie*, 483.
2. But the equitable title will pass, if the assignment be sufficient to transfer it by the laws of the state in which the assignor resides, and if the laws of the state where the corporations exist do not prohibit the assignment of equitable interests in stock. Such an assignment will bind all persons who have notice of it. *Ib.*

ASSIGNMENT—(*Continued.*)
3. The laws of Louisiana do not prohibit the assignment of equitable interests in the state by residents of other states. *Ib.*
4. Personal property has no locality. The law of the owner's domicil is to determine the validity of the transfer or alienation thereof, unless there is some positive or customary law of the country where it is found to the contrary. *Ib.*

ASSUMPSIT.
Since the passage of the act of Congress of March 3, 1839, chap. 82, which requires collectors of the customs to place to the credit of the treasurer of the United States all money which they receive for unascertained duties, or for duties paid under protest, an action of assumpsit for money had and received will not lie against the collector for the return of such duties so received by him. *Cary* v. *Curtis*, 236.

ATTACHMEMT.
The laws of Louisiana, allowing attachments for debts not yet due, relate only to absconding debtors. *Black* v. *Zacharie*, 483.

BANKRUPTS AND BANKRUPTCY.
1. In Kentucky, the creditor obtains a lien upon the property of his debtor by the delivery of a *fi fa.* to the sheriff; and this lien is as absolute before the levy as it is afterwards. *Savage's Assignee* v. *Best*, 111.
2. Therefore, a creditor is not deprived of this lien by an act of bankruptcy on the part of the debtor committed before the levy is made, but after the execution is in the hands of the sheriff. *Ib.*
3. This court has no revising power over the decrees of the District Court sitting in bankruptcy; nor is it authorized to issue a writ of prohibition to it in any case except where the District Court is proceeding as a court of admiralty and maritime jurisdiction. *Ex parte Christy*, 292.
4. The District Court, when sitting in bankruptcy, has jurisdiction over liens and mortgages existing upon the property of a bankrupt, so as to inquire into their validity and extent, and grant the same relief which the state courts might or ought to grant. *Ib.*
5. The control of the District Court over proceedings in the state courts upon such liens, is exercised, not over the state courts themselves, but upon the parties, through an injunction or other appropriate proceeding in equity. *Ib.*
6. The design of the Bankrupt Act was to secure a prompt and effectual administration of the estate of all bankrupts, worked out by the courts of the United States, without the assistance of state tribunals. *Ib.*
7. The phrase in the 6th section, "any creditor or creditors who shall claim any debt or demand under the bankruptcy," does not mean only such creditors who come in and prove their debts, but all creditors who have a present subsisting claim upon the bankrupt's estate, whether they have a security or mortgage therefor or not. *Ib.*
8. Such creditors have a right to ask that the property mortgaged shall be sold, and the proceeds applied towards the payment of their debts; and the assignee, on the other hand, may contest their claims. *Ib.*
9. In the case of a contested claim, the District Court has jurisdiction, if resort be had to a formal bill in equity or other plenary proceeding; and also jurisdiction to proceed summarily. *Ib.*
10. The principles established in the case of *Ex parte the City Bank of New Orleans* in the matter of *Christy, assignee of Walden*, renewed and confirmed. *Norton's Assignee* v. *Boyd*, 426.
11. But this court does not decide, whether or not the jurisdiction of the District Court over all the property of a bankrupt, mortgaged or otherwise, is exclusive, so as to take away from the state courts in such cases. *Ib.*
12. Where the defendant below became a bankrupt, this court will not award a supersedeas to stay an execution, because the assignee of the bankrupt has his remedy in the Circuit Court. *Black* v. *Zacharie*, 483.

BILLS OF EXCHANGE AND PROMISSORY NOTES.
See COMMERCIAL LAW.

CHANCERY.
1. In cases of trust, where the trustee has violated his trust by an illegal conversion of the trust property, the *cestui que trust* has a right to follow the property into whosesoever hands he may find it, not being a

CHANCERY—(*Continued.*)
bona fide purchaser for a valuable consideration, without notice. *Oliver v. Piatt*, 333.
2. Where a trustee has, in violation of his trust, invested the trust property or its proceeds in any other property, the *cestui que trust* has his option, either to hold the substituted property liable to the original trust, or to hold the trustee himself personally liable for the breach of the trust. *Ib.*
3. The option, however, belongs to the *cestui que trust* alone and is for his benefit, and not for the benefit of the trustee. *Ib.*
4. If the trustee, after such an unlawful conversion of the trust property, should re-purchase it, the *cestui que trust* may, at his option, either hold the original property subject to the trust, or take the substituted property in which it has been invested, in lieu thereof. And the trustee, in such a case, has no right to insist that the trust shall, upon the re-purchase, attach exclusively to the original trust property. *Ib.*
5. Where the trust property has been unlawfully invested, with other funds of the trustee, in other property, the latter, in the hands of the trustee, is chargeable *pro tanto* to the amount or value of the original trust property. *Ib.*
6. What constitutes a notice of a trust? *Ib.*
7. An agent, employed by a trustee in the management of the trust property, and who thereby acquires a knowledge of the trust, is, if he afterwards becomes possessed of the trust property, bound by the trust, in the same manner as the trustee. *Ib.*
8. Where, upon the face of the title-papers, the purchaser has full means of acquiring complete knowledge of the title from the references therein made to the origin and consideration thereof, he will be deemed to have constructive notice thereof. *Ib.*
9. A co-proprietor of real property, derived under the same title as the other proprietors, is presumed to have full knowledge of the objects and purposes and trusts attached to the original purchase, and for which it is then held for their common benefit. *Ib.*
10. A purchaser by a deed of quit claim without any covenant of warranty, is not entitled to protection in a court of equity as a purchaser for a valuable consideration, without notice; and he takes only what the vendor could lawfully convey. *Ib.*
11. A warranty, either lineal or collateral, is no bar to an heir who does not claim the property to which the warranty is attached by descent, but as a purchaser thereof. *Ib.*
12. Whether a bill in equity is open to the objection of multifariousness or not, must be decided upon all the circumstances of the particular case. No general rule can be laid down upon the subject; and much must be left to the discretion of the court. *Ib.*
13. The objection of multifariousness can be taken by a party to the bill only by demurrer, or plea, or answer, and cannot be taken at the hearing of the cause. But the court itself may take the objection at any time—at the hearing or otherwise. The objection cannot be taken by a party in the appellate court. *Ib.*
14. Lapse of time is no bar to a subsisting trust in real property. The bar does not begin to run until knowledge of some overt act of an adverse claim or right set up by the trustee is brought home to the *cestui que trust*. The lapse of any period less than twenty years will not bar the *cestui que trust* of his remedy in equity, although he may have been guilty of some negligence, where the suit is brought against his trustee, who is guilty of the breach of trust, or others claiming under him with notice. *Ib.*
15. Where exceptions are taken to a master's report, it is not necessary for the court formally to allow or disallow them on the record. It will be sufficient, if it appears from the record, that all of them have been considered by the court, and allowed or disallowed, and the report reformed accordingly. *Ib.*
16. There is no principle of the common law which forbids individuals from associating together to purchase lands of the United States on joint account at a public sale. *Ib.*
17. The Supreme Court has no power to review its decisions, whether in a

CHANCERY—(*Continued.*)
case at law or in equity. A final decree in chancery is as conclusive as a judgment at law. *Washington Bridge Co.* v. *Stewart*, 413.
18. In case of controversy, a court of equity is the proper tribunal to prevent an injurious act by a public officer, for which the law might give no adequate redress, or to avoid a multiplicity of suits, or to prevent a cloud from being cast over the title. *Carroll v. Safford*, 441.
19. The legal title to stock held in corporations, situated in Louisiana, does not pass under a general assignment of property, until the transfer is completed in the mode pointed out by the laws of Louisiana, regulating those corporations. *Black* v. *Zacharie*, 483.
20. But the equitable title will pass, if the assignment be sufficient to transfer it by the laws of the state in which the assignor resides, and if the laws of the state where the corporations exist do not prohibit the assignment of equitable interests in stock. Such an assignment will bind all persons who have notice of it. *Ib.*
21. The laws of Louisiana do not prohibit the assignment of equitable interests in the state by residents of other states. *Ib.*
22. Personal property has no locality. The law of the owner's domicil is to determine the validity of the transfer or alienation thereof, unless there is some positive or customary law of the country where it is found to the contrary. *Ib.*
23. When an issue is directed by a court of chancery, to be tried by a court of law, and in the course of the trial at law, questions are raised and bills of exceptions taken, these questions must be brought to the notice and decision of the court of chancery which sends the issue. *Brockett* v. *Brockett*, 691.
24. If this is not done, the objections connot be taken in an appellate court of chancery. *Ib.*
25. If the chancery court below refers matters of account to a master, his report cannot be objected to in the appellate court, unless exceptions to it have been filed in the court below in the manner pointed out in the seventy-third chancery rule of this court. *Ib.*
26. A defendant in ejectment cannot protect himself by setting up the record in a prior chancery suit between the same parties, by which the plaintiff in the ejectment had been ordered to convey all his title to the defendant in the ejectment, but in consequence of the party being beyond the jurisdiction of the court, no such conveyance had been made. *Lessee of Hickey* v. *Stewart*, 750.
27. And this is so, although the Court of Chancery, in following up its decree, had legally issued a *habere facias possessionem*, and put the defendant in ejectment in possession of the land. *Ib.*
28. An equitable title is no defence in a suit brought by the United States, to recover possession of land. An imperfect title derived from Spain, before the cession, cannot be supported against a party claiming under a grant from the United States. *United States* v. *King et al.*, 773.

COLLATERAL SECURITY.
See COMMERCIAL LAW, 1–4.

COMMERCIAL LAW.
1. Every subsequent security, given for a loan originally usurious, however remote or often renewed, is void. *Walker* v. *Bank of Washington*, 62.
2. Where there was an application to a bank for a discount upon a note, to be secured collaterally, and the party applying drew checks upon the bank which were paid before the note was actually discounted; and the bank treated the note, when discounted, as having been so on the day of its date, instead of a subsequent day on which its proceeds were carried to the credit of the party, it was held not to be usury. *Ib.*
3. The court below was right in refusing an instruction to the jury that, upon such evidence, they might presume usury as a fact. *Ib.*
4. In cases of a written contract, the question of usury is exclusively for the decision of the court. *Ib.*
5. This court adheres to the rule laid down in *Walton* v. *Shelly*, 1 T. R., 296, sustained as it has been by the decisions of this court in *The Bank of the United States* v. *Dunn*, 6 Pet., 57; *The Bank of the Metropolis* v. *Jones*, 8 Id., 12, and *Scott* v. *Lloyd*, viz., that a party to a negotiable

COMMERCIAL LAW—(*Continued.*)
paper, having given it value and currency by the sanction of his name, shall not afterwards invalidate it by showing, upon his own testimony, that the consideration on which it was executed was illegal. *Henderson* v. *Anderson*, 73.
6. When a creditor, residing in Louisiana, drew bills of exchange upon his debtor, residing in South Carolina, which bills were negotiated to a third person and accepted by the drawee, the creditor had no right to lay an attachment upon the property of the debtor, until the bills had become due, were dishonored, and taken up by the drawer. *Black* v. *Zacharie*, 483.
7. By the drawing of the bills a new credit was extended to the debtor for the time to which they ran. *Ib.*
8. The laws of Louisiana, allowing attachments for debts not yet due, relate only to absconding debtors, and do not embrace a case like the above. *Ib.*
9. The legal title to stock held in corporations situated in Louisiana, does not pass under a general assignment of property, until the transfer is completed in the mode pointed out by the laws of Louisiana regulating those corporations. *Ib.*
10. But the equitable title will pass, if the assignment be sufficient to transfer it by the laws of the state in which the assignor resides, and if the laws of the state where the corporations exist do not prohibit the assignment of equitable interests in stock. Such an assignment will bind all persons who have notice of it. *Ib.*
11. The laws of Louisiana do not prohibit the assignment of equitable interests in the state, by residents of other states. *Ib.*
12. Personal property has no locality. The law of the owner's domicil is to determine the validity of the transfer or alienation thereof, unless there is some positive or customary law of the country where it is found, to the contrary. *Ib.*
13. Where a general objection is made, in the court below, to the reception of testimony, without stating the grounds of the objection, this court considers it as vague and nugatory; nor ought it to have been tolerated in the court below. *Camden* v. *Doremus*, 515.
14. Where at the time of the endorsement and transfer of a negotiable note, an agreement was made that the holder should send it for collection to the bank at which it was, on its face, made payable, and in the event of its not being paid at maturity, should use reasonable and due diligence to collect it from the drawer and prior endorsers before resorting to the last endorser, the holder is bound to conditions beyond those which are implied in the ordinary transfer and receipt of commercial instruments. *Ib.*
15. Evidence of the general custom of banks to give previous notice to the payer, of the time when notes will fall due, was properly rejected, unless the witness could testify as to the practice of the particular bank at which the note was made payable. *Ib.*
16. A presentment and demand of payment of the note, at maturity, within banking hours, at the bank where the note was made payable, was a sufficient compliance with the contract to send it to the bank for collection. *Ib.*
17. The record of a suit brought by the holder against the maker and prior endorsers was proper evidence of reasonable and due diligence to collect the amount of the note from them; and it was a proper instruction, that if the jury believed that the prior endorsers had left the state and were insolvent, the holder of the note was not bound to send executions to the counties where these endorsers resided at the institution of the suit. *Ib.*
18. The diligent and honest prosecution of a suit to judgment with a return of *nulla bona*, has always been regarded as one of the extreme tests of due diligence. *Ib.*
19. And the ascertainment, upon correct and sufficient proofs, of entire and notorious insolvency, is recognized by the law as answering the demand of due diligence, and as dispensing with the more dilatory evidence of a suit. *Ib.*

COMMERCIAL LAW—(*Continued.*)
20. If the holder cannot obtain a judgment against the maker for the whole amount of the note, in consequence of the allowance of a set-off as between the maker and one of the prior endorsers, this is no bar to a full recovery against the last endorser, provided the holder has been guilty of no negligence. *Ib.*
21. Whenever, by express agreement of the parties, a sub-agent is to be employed by an agent to receive money for the principal; or where an authority to do so may fairly be implied from the usual course of trade, or the nature of the transaction; the principal may treat the sub-agent as his agent, and when he has received the money, may recover it in an action for money had and received. *Wilson & Co.* v. *Smith*, 768.
22. If, in such case, the sub-agent has made no advances and given no new credit to the agent on account of the remittance of the bill, the sub-agent cannot protect himself against such an action by passing the amount of the bill to the general credit of the agent, although the agent may be his debtor. *Ib.*

COMPROMISE ACT.
1. The act of Congress of March 2d, 1833, commonly called the Compromise Act, did not, prospectively, repeal all duties upon imports after the 30th of June, 1842. *Aldridge et al.* v. *Williams*, 9.
2. Repealing only such parts of previous acts as were inconsistent with itself, it left in force, after the 30th of June, 1842, the same duties which were levied on the 1st of June, 1842. *Ib.*
3. Duties were directed by the act of 1833 to be levied according to a home valuation, "under such regulations as may be prescribed by law." This phrase embraces all regulations lawfully existing at the time the home valuation went into operation, whether made before or after the passage of the act of 1833. *Ib.*
4. And the regulations established in the 7th and 8th sections of the act of 1832 are sufficient for the correct performance of the duty. *Ib.*
5. The regulations prescribed by the Secretary of the Treasury, under a power given to him by the 9th section of the act of 1832, are also "regulations prescribed by law."

CONSTITUTIONAL LAW.
See JURISDICTION.
1. A public officer, acting from a sense of duty in a matter where he is required to exercise discretion, is not liable to an action for an error of judgment. *Kendall* v. *Stokes, et al.*, 87.
2. The charter of a bank is a franchise, which is not taxable, as such, if a price has been paid for it, which the legislature accepted. *Gordon* v. *Appeal Tax Court*, 133.
3. But the corporate property of the bank is separable from the franchise, and may be taxed, unless there is a special agreement to the contrary. *Ib.*
4. The legislature of Maryland, in 1821, continued the charters of several banks to 1845, upon condition that they would make a road and pay a school tax. This would have exempted their franchise, but not their property, from taxation. *Ib.*
5. But another clause in the law provided, that upon any of the aforesaid banks accepting of and complying with the terms and conditions of the act, the faith of the state was pledged not to impose any further tax or burden upon them during the continuance of their charters under the act. *Ib.*
6. This was a contract relating to something beyond the franchise, and exempted the stockholders from a tax levied upon them as individuals, according to the amount of their stock. *Ib.*
7. Under the acts of Congress ceding to Pennsylvania that part of the Cumberland road which is within that state, and the acts of Pennsylvania accepting the surrender, a carriage, whenever it is carrying the mail, must be held to be laden with the property of the United States, within the true meaning of the compact, and consequently exempted from the payment of tolls. *Searight* v *Stokes*, 151.
8. But this exemption does not apply to any other property conveyed in the same vehicle, nor to any person travelling in it, unless he is in the service of the United States, and passing along in pursuance of orders from the proper authority. *Ib.*

CONSTITUTIONAL LAW—(*Continued.*)
9. Nor can the United States claim an exemption for more carriages than are necessary for the safe, speedy, and convenient conveyance of the mail. *Ib.*
10. The stipulation contained in the 6th section of the act of Congress, passed on the 2d of March, 1819, for the admission of the state of Alabama into the union, viz.: "that all navigable waters within the said state shall for ever remain public highways, free to the citizens of said state, and of the United States, without any tax, duty, impost, or toll therefor, imposed by said state," conveys no more power over the navigable waters of Alabama, to the government of the United States, than it possesses over the navigable waters of other states under the provisions of the Constitution. *Pollard's Lessee* v *Hagan*, 212.
11. And it leaves as much right in the State of Alabama over them as the original states possess over navigable waters within their respective limits. *Ib.*
12. The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively; and the new states have the same rights, sovereignty, and jurisdiction over this subject as the original states. *Ib.*
13. The United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory of which Alabama, or any of the new states, were formed, except for temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia legislatures, and the deeds of cession executed by them to the United States, and the trust created by the treaty of the 30th April, 1803, with the French republic, ceding Louisiana. *Ib.*
14. Upon the admission of Alabama into the union, the right of eminent domain, which had been temporarily held by the United States, passed to the state. Nothing remained in the United States but the public lands. *Ib.*
15. The United States now hold the public lands in the new states by force of the deeds of cession and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess or have received by compact with the new states for that particular purpose. *Ib.*
16. That part of the compact respecting the public lands, is nothing more than the exercise of a constitutional power vested in Congress, and would have been binding on the people of the new states, whether they consented to be bound or not. *Ib.*
17. Under the Florida treaty the United States did not succeed to those rights which the King of Spain had held by virtue of his royal prerogative, but possessed the territory subject to the institutions and laws of its own government. *Ib.*
18. By the acts of Congress under which Alabama was erected a territory and a state, the common law was extended over it to the exclusion of all other law, Spanish or French. *Ib.*
19. The treaty of 1795 was not a cession of territory by Spain to the United States, but the recognition of a boundary line, and an admission, by Spain, that all the territory on the American side of the line was originally within the United States. *Ib.*
20. The United States have never admitted that they derived title from the Spanish government to any portion of territory included within the limits of Alabama; for, by the treaty of 1795, Spain admitted that she had no claim to any territory above the thirty-first degree of north latitude, and the United States derived its title to all below that degree from France, under the Louisiana treaty. *Ib.*
21. It results from these principles that the right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant land in Alabama which was below usual high water-mark at the time Alabama was admitted into the union. *Ib.*
22. The state of Maryland, in 1836, passed a law directing a subscription of $3,000,000 to be made to the capital stock of the Baltimore and Ohio Railroad Company, with the following proviso, "That if the said

CONSTITUTIONAL LAW—(*Continued.*)
company shall not locate the said road in the manner provided for in this act, then, and in that case, they shall forfeit $1,000,000 to the state of Maryland for the use of Washington county.
23. In March, 1841, the state passed another act repealing so much of the prior act as made it the duty of the company to construct the road by the route therein prescribed, remitting and releasing the penalty, and directing the discontinuance of any suit brought to recover the same.
24. The proviso was a measure of state policy, which it had a right to change, if the policy was afterwards discovered to be erroneous, and neither the commissioners, nor the county, nor any one of its citizens acquired any separate or private interest under it, which could be maintained in a court of justice. *State of Maryland* v. *Baltimore and Ohio Railroad Company*, 534.
25. It was a penalty, inflicted upon the company as a punishment for disobeying the law; and the assent of the company to it, as a supplemental charter, is not sufficient to deprive it of the character of a penalty. *Ib.*
26. A clause of forfeiture in a law is to be construed differently from a similar clause in an engagement between individuals. A legislature can impose it as a punishment, but individuals can only make it a matter of contract. Being a penalty imposed by law, the legislature had a right to remit. *Ib.*
27. A law of the state of Indiana, passed after an execution was issued, requiring that property should be appraised and not sold unless it brought a certain amount, could not avoid the deed of the sheriff in a case where the property was sold without appraisement. *Gantly's Lessee* v. *Ewing*, 707.
28. Under the acts of Congress and of the state of Ohio, relating to the surrender and acceptance of the Cumberland road, a toll charged upon passengers travelling in the mail stages, without being charged also upon passengers travelling in other stages, is against the contract, and void. *Neil, Moore & Co.* v. *The State of Ohio*, 720.
29. It rests altogether in the discretion of the postmaster-general, to determine at what hours the mail shall leave particular places and arrive at others, and to determine whether it shall leave the same place only once a day or more frequently. *Ib.*
30. It is not, therefore, the mere frequency of the departure of carriages, carrying the mail, that constitutes an abuse of the privilege of the United States, but the unnecessary division of the mail bags amongst a number of carriages in order to evade the payment of tolls. *Ib.*

CONSTRUCTION OF STATUTES.
1. The court, in construing an act, will not consider the motives, or reasons, or opinions, expressed by individual members of Congress, in debate, but will look, if necessary, to the public history of the times in which it was passed. *Aldridge et al* v. *Williams*, 9.
See DUTIES, LEAD MINES, CONSTITUTIONAL LAW, BANKRUPTCY, MARINE CORPS, LANDS—PUBLIC.
2. The mere construction of a will by a state court, does not, as the construction of a statute of the state, constitute a rule of decision for the courts of the United States. If such construction by a state court had been long acquiesced in, so as to become a rule of property, this court would follow it. *Lane* v. *Vick*, 464.
3. A clause of forfeiture in a law is to be construed differently from a similar clause in an engagement between individuals. A legislature can impose it as a punishment, but individuals can only make it a matter of contract. *State of Maryland* v. *Baltimore and Ohio Railroad Company*, 534.
4. Being a penalty imposed by law, the legislature has a right to remit it. *Ib.*
5. Statutes *in pari materia* should be taken into consideration in construing a law. If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute. *United States* v. *Freeman*, 556.
6. And if it can be gathered from a subsequent statute *in pari materia* what meaning the legislature attached to the words of a former statute, this will amount to a legislative declaration of its meaning, and will govern the construction of the first statute. *Ib.*

CONSTRUCTION OF STATUTES—(*Continued.*)
7. The meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed; the limitation of the rule being that to extend the meaning to any case, not included within the words, the case must be shown to come within the same reason upon which the law-maker proceeded, and not a like reason. *Ib.*
8. In affirmative statutes, such parts of the prior as may be incorporated into the subsequent statute, as consistent with it, must be considered in force. *Davies* v *Fairbairn*, 636.
9. If a subsequent statute be not repugnant in all its provisions to a prior one, yet if the later statute clearly intended to prescribe the only rules which should govern, it repeals the prior one. *Ib.*
10. Under the application of these rules, the law of Virginia, passed in 1776, authorizing the mayor of a city to take the acknowledgment of a feme covert to a deed, is not repealed by the act of 1785, or that of 1796. *Ib.*
11. The act of Congress of the 29th April, 1816, confirming certain claims to land to the extent of a league square, restricted it to that quantity, and cannot be construed as confirming the residue. *United States* v. *King et al.*, 773.

CORPORATIONS.
1. The legal title to stock held in corporations situated in Louisiana does not pass under a general assignment of property, until the transfer is completed in the mode pointed out by the laws of Louisiana, regulating those corporations. *Black* v. *Zacharie*, 483.
2. But the equitable title will pass, if the assignment be sufficient to transfer it by the laws of the state in which the assignee resides, and if the laws of the state where the corporations exist do not prohibit the assignment of equitable interests in stock. Such an assignment will bind all persons who have notice of it. *Ib.*

CUSTOMS.
See COMPROMISE ACT; DUTIES.

DEBTOR AND CREDITOR.
See BANKRUPTS.

DEVISE.
1. Newit Vick made the following devises, viz.:

"2dly. I will and bequeath unto my beloved wife, Elizabeth Vick, one equal share of all my personal estate, as is to be divided between her and all of my children, as her own right, and at her own disposal during her natural life; and also, for the term of her life on earth, the tract of land at the Open Woods on which I now reside, or the tracts near the river, as she may choose, reserving two hundred acres however, on the upper part of the uppermost tract, to be laid off in town lots at the discretion of my executrix and executors.

"3dly. I will and dispose to each of my daughters, one equal proportion with my sons and wife, of all my personal estate as they come of age or marry; and to my sons, one equal part of said personal estate as they come of age, together with all of my lands, all of which lands I wish to be appraised, valued, and divided when my son Westley arrives at the age of twenty-one years, the said Westley having one part, and my son William having the other part of the tracts unclaimed by my wife, Elizabeth; and I bequeath to my son Newit, at the death of my said wife, that tract which she may prefer to occupy. I wish it to be distinctly understood, that that part of my estate which my son Hartwell has received shall be valued, considered as his, and as a part of his portion of my estate.

"I wish my executors, furthermore, to remember, that the town lots now laid off, and hereafter to be laid off, on the aforementioned two hundred acres of land, should be sold to pay my just debts, or other engagements, in preference to any other of my property, for the use and benefit of all my heirs."

From the provisions of the will it appears not to have been the intention of the testator to include the town lots in the devise of his lands to his sons.

DEVISE—(*Continued.*)
But these town lots must be sold, after the payment of debts, for the use and benefit of all the heirs of the testator. *Lane* v. *Vick*, 464.
2. Where a testator devised certain property to his infant daughter, to be delivered over to her when she should arrive at the age of eighteen years, and the daughter, at the age of sixteen, married the executor who had the principal management of the estate, and possession of the property devised, he must be considered as holding it as executor, and not as husband. *Price* v. *Sessions*, 624.
3. The executors had no power to deliver the property to the daughter, or to her guardian, or to her husband, before the happening of the contingency mentioned in the will. *Ib.*
4. The law of the state of Mississippi, providing that a wife should retain such property in her own right, notwithstanding her coverture, having gone into operation before the daughter arrived at the age of eighteen years, the distribution to her must be considered to have been made under that law. *Ib.*
5. The property, therefore, cannot be held responsible for the husband's debts. *Ib.*

DISCOUNTS.
See COMMERCIAL LAW, 2.

DUTIES.
See COMPROMISE ACT.
1. An act of Congress imposing a duty upon imports must be construed to describe the article upon which the duty is imposed, according to the commercial understanding of the terms used in the law in our own markets at the time when the law was passed. *Curtis* v. *Martin*, 106.
2. The duty, therefore, imposed by the act of 1832 upon cotton bagging, cannot properly be levied upon an article which was not known in the market as cotton bagging in 1832, although it may subsequently be called so. *Ib.*
3. When an importer means to contest the payment of duties, it is not necessary for him to give a written notice thereof to the collector. *Swartwout* v. *Ohon*, 110.
4. The question of notice is a fact for the jury, and it makes no difference, for the purposes for which it is required, whether it is written or verbal. *Ib.*
5. It is the right of an officer of the customs to seize goods which are suspected to have been introduced into the country in violation of the revenue laws, not only in his own district, but also in any other district than his own. *Taylor et. al* v. *The United States*, 197.
6. And it is wholly immaterial who makes the seizure, or whether it was irregularly made or not, or whether the cause assigned originally for the seizure be that for which the condemnation takes place, provided the adjudication is for a sufficient cause. *Ib.*
7. In the trial of such a case the officers of the customs who made the seizure are competent witnesses. *Ib.*
8. A bill of lading, entry, and owner's oath concerning other goods than those seized, may be admitted as a link in the chain of evidence to show a privity between the parties to commit a fraud upon the revenue. *Ib.*
9. When a witness on the part of the United States stated, that his firm were importers of cloths, and was asked, upon a cross-examination, to state the extent of their importations, to which he answered, "formerly we imported large quantities of woolens; for three or four years past we have imported but a few packages annually," it was a proper question on the part of the United States, "whether there was any thing in the state of the market which caused the alteration?" *Ib.*
10. It was also a proper question, whether other goods than those seized were lying in the custom-house at New York, under circumstances from which the jury might infer a connivance between parties inconsistent with fair dealing. *Ib.*
11. An invoice of other goods entered at another port, but marked like those seized, was also properly admitted as strengthening the evidence of the true ownership of packages with this mark. *Ib.*
12. To rebut the proof of a general usage of an allowance of five per cent. for

DUTIES—(*Continued.*)
measurement, other invoices were properly introduced in which there was no such allowance. *Ib.*
13. Where a witness was introduced to prove such usage, and had verified his own invoices, it was admissible to read a letter which had been addressed to the witness and was annexed to one of the invoices. *Ib.*
14. Revenue-laws, for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not, in a strict sense, penal acts, although they impose a penalty. But they ought to be so construed as most effectually to accomplish the intention of the legislature in passing them, instead of being construed with great strictness in favor of the defendant. *Ib.*
15. Concealment and under-valuation of goods are good grounds, amongst others, for a decision of the court, that probable cause of prosecution existed. *Ib.*
16. The 68th section of the act of 1799 reaches cases where, by a false and fraudulent under-valuation, less than the amount of duties required by law has been paid as well as those where no duties at all have been paid. *Ib.*
17. Since the passage of the act of Congress of March 3d, 1839, ch. 82, § 2, which requires collectors of the customs to place to the credit of the treasurer of the United States all money which they receive for unascertained duties or for duties paid under protest, an action of assumpsit for money had and received will not lie against the collector for the return of such duties so received by him. *Cary* v. *Curtis*, 236.
18. In what other modes the claimant can have access to the courts of justice, this court is not called upon in this case to decide. *Ib.*

EQUITY.
1. Before a case can be dismissed under the 21st rule, regulating equity practice, there must exist, in the technical sense, a plea or demurrer on the part of the defendant, which the plaintiff shall not have replied to or set down for hearing before the second term of the court after filing the same. *Poultney* v. *City of Lafayette*, 81.
2. The complainant, if he chooses, may go to the hearing, on bill and answer. *Ib.*
3. In case of controversy, a court of equity is the proper tribunal to prevent an injurious act by a public officer, for which the law might give no adequate redress, or to avoid a multiplicity of suits, or to prevent a cloud from being cast over the title. *Carroll* v. *Safford*, 441.
4. Whether a bill in equity is open to the objection of multifariousness or not, must be decided upon all the circumstances of the particular case. No general rule can be laid down upon the subject; and much must be left to the discretion of the court. *Oliver* v. *Platt*, 333.
5. The objection of multifariousness can be taken by a party to the bill only by demurrer, or plea, or answer, and cannot be taken at the hearing of the cause. But the court itself may take the objection at any time—at the hearing or otherwise. The objection cannot be taken by a party in the appellate court. *Ib.*
6. Lapse of time is no bar to a subsisting trust in real property. The bar does not begin to run until knowledge of some overt act of an adverse claim or right set up by the trustee is brought home to the *cestui que trust*. The lapse of any period less than twenty years will not bar the *cestui que trust* of his remedy in equity, although he may have been guilty of some negligence, where the suit is brought against his trustee, who is guilty of the breach of trust, or others claiming under him with notice. *Ib.*

ERROR.
1. Where a general objection is made, in the court below, to the reception of testimony, without stating the grounds of the objection, this court considers it as vague and nugatory; nor ought it to have been tolerated in the court below. *Camden* v. *Doremus*, 515.
2. This court has not jurisdiction, under the 25th section of the Judiciary Act, of a question whether an ordinance of the corporate authorities of New Orleans does or does not impair religious liberty. *Permoli* v. *First Municipality*, 589.

ERROR—(*Continued.*)
3. The Constitution of the United States makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws. *Ib.*
4. If the citation be signed by the clerk, and not by a judge of the Circuit Court, or a justice of the Supreme Court, the case will, on motion, be dismissed. *United States* v. *Hodge*, 534.

EVIDENCE.
1. When a party to negotiable paper has given it value and currency by the sanction of his name, he shall not afterwards invalidate it, by showing, upon his own testimony, that the consideration on which it was executed was illegal. *Henderson* v. *Anderson*, 73.
2. In the trial of a cause for the seizure of goods for the violation of the revenue laws, the officers who made the seizure are competent witnesses. *Taylor et al.* v. *The United States*, 197.
3. A bill of lading, entry, and owner's oath concerning other goods than those seized, may be admitted as a link in the chain of evidence to show a privity between the parties to commit a fraud upon the revenue. *Ib.* See DUTIES.
4. Where a general objection is made, in the court below, to the reception of testimony, without stating the grounds of the objection, the court consider it as vague and nugatory; nor ought it to have been tolerated in the court below. *Camden* v. *Doremus*, 515.

EXECUTION.
1. In Kentucky, the creditor obtains a lien upon the property of his debtor by the delivery of a *fi. fa.* to the sheriff; and this lien is as absolute before the levy as it is afterwards. *Savage's Assignee* v. *Best*, 111.
2. Therefore, a creditor is not deprived of this lien by an act of bankruptcy on the part of the debtor committed before the levy is made, but after the execution is in the hands of the sheriff. *Ib.*
3. A law of the state of Indiana, directing "that real and personal estate, taken in execution, shall sell for the best price the same will bring at public auction and outcry, except that the fee-simple of real estate shall not be sold to satisfy any execution or executions, until the rents and profits for the term of seven years of such real estate shall have been first offered for sale at public auction and outcry; and if such rents and profits will not sell for a sum sufficient to satisfy such execution or executions, then the fee-simple shall be sold," is not merely directory to the sheriff, but restrictive of his power to sell the fee-simple. *Gantly's Lessee* v. *Ewing*, 707.
4. If he sells the fee-simple without having previously offered the rents and profits, his deed is void. *Ib.*
5. A marshal is not authorized by law to receive any thing, in discharge of an execution, but gold and silver, unless the plaintiff authorizes him to receive something else. *McFarland* v. *Gwin*, 717.
6. The case of *Griffin et al.* v. *Thompson*, 2 How., 244, reviewed and confirmed. *Ib.*
7. A marshal, like a sheriff, is bound, after the expiration of his term of office, to complete an execution which has come to his hands during his term; and an execution is never completed until the money is made and paid over to the plaintiff, if it is practicable to make it. *Ib.*

EXECUTORS AND ADMINISTRATORS.
See PRACTICE, DEVISE.

FEME COVERT.
1. Where property devised to a woman who afterwards married, was held not to be responsible for her husband's debts. *Price* v. *Sessions*, 624.

HABEAS CORPUS.
1. Neither the Supreme Court, nor any other court of the United States, or judge thereof, can issue a *habeas corpus* to bring up a prisoner, who is in custody under a sentence or execution of a state court, for any other purpose than to be used as a witness. *Ex parte Dorr*, 103.

JURISDICTION.
See ADMIRALTY.
1. The Circuit Court of the United States has jurisdiction where a promissory note is made by a citizen of one state payable to another citizen

JURISDICTION—(*Continued.*)
of the same state or bearer, and the party bringing the suit is a citizen of a different state; although upon the face of the note it was expressed to be for the use of persons residing in the state in which the maker and payee lived. *Bonaffe* v. *Williams*, 574.

2. Where the citizenship of the parties gives jurisdiction, and the legal right to sue is in the plaintiff, the court will not inquire into the residence of those who may have an equitable interest in the claim. *Ib.*
3. This court has not jurisdiction, under the 25th section of the Judiciary Act, of a question whether an ordinance of the corporate authorities of New Orleans does or does not impair religious liberty. *Permoli* v. *First Municipality*, 589.
4. The Constitution of the United States makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws. *Ib.*
5. The act of February 20th, 1811, authorizing the people of the territory of Orleans to form a constitution and state government, contained, in the third section thereof, two provisos; one in the nature of instructions how the constitution was to be formed, and the other reserving to the United States the property in the public lands, their exemption from state taxation, and the common right to navigate the Mississippi. *Ib.*
6. The first of these provisos was fully satisfied by the act of 1812, admitting Louisiana into the union, "on an equal footing with the original states." The conditions and terms referred to in the act of admission referred solely to the second proviso, involving rights of property and navigation. *Ib.*
7. The act of 1805, ch. 83, extending to the inhabitants of the Orleans territory, the rights, privileges and advantages secured to the North Western territory by the ordinance of 1787, had no further force after the adoption of the state constitution of Louisiana, than other acts of Congress, organizing the territorial government, and standing in connection with the ordinance. They are none of them in force unless they were adopted by the state constitution. *Ib.*
8. The treaty by which Louisiana was ceded to the United States recognized complete grants, issued anterior to the cession, and a decision of a state court against the validity of a title set up under such a grant, would be subject to revisal by this court under the 25th section of the Judiciary Act. *McDonogh* v. *Millaudon*, 693.
9. But if the state court only applies the local laws of the state to the construction of the grant, it is not a decision against its validity, and this court has no jurisdiction. *Ib.*
10. Congress, in acting upon complete grants, recognized them as they stood; and the act of 11th May, 1820, confirming such as were recommended for confirmation by the register and receiver, had no reference to any particular surveys. *Ib.*
11. A decision of a state court, therefore, which may be in opposition to one of these surveys, is not against the validity of a title existing under an act of Congress, and this court has no jurisdiction in such a case. *Ib.*
12. The doctrine of this court in 1 Pet., 340, reviewed and confirmed, viz., "that the jurisdiction of any court exercising authority over a subject may be inquired into in every other court where the proceedings of the former are relied on, and brought before the latter by the party claiming the benefit of such proceeding." *Lessee of Hickey* v. *Stewart*, 750.
13. Where a matter in dispute is below the amount necessary to give jurisdiction to this court, the writ of error must be dismissed, on motion. *Winston* v. *The United States*, 771.
14. Where a bill was filed on the equity side of the court below, to enjoin the marshal from levying an execution upon certain property, which execution was for a less sum than two thousand dollars, an appeal from a decree dismissing the bill will not lie to this court, although the entire value of the property may be more than two thousand dollars. *Ross* v. *Prentiss*, 771.
15. The jurisdiction of the court does not depend upon the amount of any contingent loss or damage which one of the parties may sustain by a decision against him, but upon the amount in dispute between them. *Ib.*

LANDS, PUBLIC.
See CONSTITUTIONAL LAW, LEAD MINES.

1. Under the act of 1815, a New Madrid certificate could be located upon lands before they were offered at public sale under a proclamation of the President, or even surveyed by the public surveyor. *Barry* v. *Gamble*, 32.
2. The act of 1822 recognized locations of this kind, although they disregarded the sectional lines by which the surveys were afterwards made. *Ib.*
3. Under the acts of 1805, 1806, and 1807, it was necessary to file the evidences of an incomplete claim under French or Spanish authority, which bore date anterior to the 1st of October, 1800, as well as those which were dated subsequent to that day; and in cases of neglect, the bar provided in the acts applied to both classes. *Ib.*
4. A title resting on a permit to settle and warrant of survey, dated before the 1st of October, 1800, without any settlement or survey having been made, was an incomplete title, and within these acts. *Ib.*
5. And although the acts of 1824 and 1828 removed the bar as it respected the United States, yet, having excepted such lands as had been sold or otherwise disposed of by the United States, and saved the rights or title of adverse claimants, these acts protected a new Madrid claim which had been located whilst the bar continued. *Ib.*
6. In making an entry of land, where mistakes occur which are occasioned by the impracticability of ascertaining the relative positions of the objects called for, the court will correct those mistakes so as to carry out the intentions of the locator. *Croghan's Lessee* v. *Nelson*, 187.
7. There is no principle of the common law which forbids individuals from associating together to purchase lands from the United States on joint account, at a public sale. *Oliver* v. *Piatt*, 333.
8. When the purchaser of land from the United States has paid for it, and received a final certificate, it is taxable property, according to the statutes of Michigan, although a patent has not yet been issued. *Carroll* v. *Safford*, 441.
9. Taxation upon lands so held is not a violation of the ordinance of 1787, as an "interference with the primary disposition of the soil by Congress," nor is it "a tax on the lands of the United States." The state of Michigan could rightfully impose the tax. *Ib.*
10. It was competent for the state to assess and tax such lands at their full value, as the absolute property of the holder of the final certificate, and in default of payment, to sell them as if he owned them in fee. *Ib.*
11. In case of controversy, a court of equity is the proper tribunal to prevent an injurious act by a public officer, for which the law might give no adequate redress, or to avoid a multiplicity of suits, or to prevent a cloud from being cast over the title. *Ib.*
12. Where this court has affirmed the title to lands in Florida, and referred in its decree to a particular survey, it would not be proper for the court below to open the case for a re-hearing, for the purpose of adopting another survey. *Chaires* v. *United States*, 611.
13. The court below can only execute the mandate of this court; it has no authority to disturb the decree, and can only settle what remains to be done. *Ib.*
14. The act of the 26th of May, 1830, providing for the final settlement of land claims in Florida, must be construed to contain the same limitation of time within which claims were to be presented, as that provided by the act of 23d of May, 1828. *United States* v. *Marvin*, 620.
15. That limitation was one year. The courts of Florida, therefore, had no right to receive a petition for the confirmation of an incomplete concession after the 26th of May, 1831. *Ib.*
16. The case in 15 Peters, 329, examined and distinguished from the present. *Ib.*
17. Under the acts of Congress, providing for the subdivision of the public lands, and the instructions of the Secretary of the Treasury, made under the act of 24th April, 1820, entitled "An act making further provision for the sale of the public lands," it is the duty of the surveyor-general to lay out a fractional section in such a manner that an entire quarter-section may be had if the fraction will admit of it. *Brown's Lessee* v. *Clements*, 650.

LANDS PUBLIC—(*Continued.*)
18. The surveyor-general has no right to divide a fractional section by arbitrary lines, so as to prevent a regular quarter-section from being taken up. *Ib.*
19. The treaty by which Louisiana was ceded to the United States, recognized complete grants, issued anterior to the cession, and the decision of a state court against the validity of a title set up under such a grant, would be subject to revisal by this court, under the 25th section of the Judiciary Act. *McDonogh* v. *Millaudon*, 693.
20. But if the state court only applies the local laws of the state to the construction of the grant, it is not a decision against its validity, and this court has no jurisdiction. *Ib.*
21. Congress, in acting upon complete grants, recognized them as they stood; and the act of 11th May, 1820, confirming such as were recommended for confirmation by the register and receiver, had no reference to any particular surveys. *Ib.*
22. A decision of a state court, therefore, which may be in opposition to one of these surveys, is not against the validity of a title existing under an act of Congress, and this court has no jurisdiction in such a case. *Ib.*
23. By the treaty of 1795, between the United States and Spain, Spain admitted that she had no title to land north of the thirty-first degree of latitude, and her previous grants of land, so situated, were of course void. The country, thus belonging to Georgia, was ceded to the United States, in 1802, with a reservation that all persons who were actual settlers on 27th October, 1795, should have their grants confirmed. Congress provided a board of commissioners to examine these grants, and declared that their decision should be final. *Lessee of Hickey* v. *Stewart*, 750.
24. The Court of Chancery of the state of Mississippi had no authority to establish one of these grants which had not been brought within the provisions of the act of Congress. The claim itself being utterly void, and no power having been conferred by Congress on that court to take or exercise jurisdiction over it, for the purpose of imparting to it legality, the exercise of jurisdiction was a mere usurpation of judicial power, and the whole proceeding of the court void. *Ib.*
25. The certificate of survey alleged to have been given by Trudeau, on the 14th of June, 1797, and brought forward to sustain a grant to the Marquis de Maison Rouge, declared ante-dated and fraudulent. *United States* v. *King et al.*, 773.
26. The circumstance that a copy of this paper was delivered by the Spanish authorities in 1803, is not sufficient to prevent its authenticity from being impeached. *Ib.*
27. Leaving this certificate out of the case, the instruments executed by the Baron de Carondelet in 1795 and 1797, have not the aid of any authentic survey to ascertain and fix the limits of the land, and to determine its location. *Ib.*
28. This court has repeatedly decided, and in cases too where the instrument contained clear words of grant, that if the description was vague and indefinite, and there was no official survey to give it a certain location, it could create no right of private property in any particular parcel of land, which could be maintained in a court of justice. *Ib.*
29. An equitable title is no defence in a suit brought by the United States. An imperfect title derived from Spain, before the cession, cannot be supported against a party claiming under a grant from the United States. *Ib.*
30. The act of Congress of the 29th April, 1816, confirming the grant to the extent of a league square, restricted it to that quantity, and cannot be construed as confirming the residue. *Ib.*
31. Query: Whether the acceptance, by the claimant, of this league square, affected his title to the residue. *Ib.*

LEAD MINES.
1. The act of Congress entitled "An act to create additional land districts in the states of Illinois and Missouri, and in the territory north of the state of Illinois," approved June 26th, 1834, does not require the President of the United States to cause to be offered for sale the public lands containing lead mines situated in the land districts created by said act. *United States* v. *Gear*, 120.

LEAD MINES—(*Continued.*)
2. The said act does not require the President to cause said lands, containing lead mines, to be sold, because the 5th section of the act of the 3d March, 1807, entitled "An act making provision for the disposal of the public lands situated between the United States military tract and the Connecticut reserve, and for other purposes," is still in full force. *Ib.*
3. The lands containing lead mines in the Indiana territory, or in that part of it made into new land districts by the act of the 26th June, 1834, are not subject, under any of the pre-emption laws which have been passed by Congress, to a pre-emption by settlers upon the public lands. *Ib.*
4. The 4th section of the act of 1834 does in no way repeal any part of the 5th section of the act of the 3d March, 1807, by which the lands containing lead mines were reserved for the future disposal of the United States, by which grants for lead-mine tracts, discovered to be such before they may be bought from the United States, are declared to be fraudulent and null, and which authorized the President to lease any lead mine which had been, or might be, discovered in the Indiana territory, for a term not exceeding five years. *Ib.*
5. The lands containing lead mines, in the districts made by the act of 1834, are not subject to pre-emption and sale under any of the existing laws of Congress. *Ib.*
6. Digging lead ore from the lead mines upon the public lands of the United States, is such a waste as entitles the United States to a writ of injunction to restrain it. *Ib.*

LIBEL.
1. In an action for a libel it is not indispensable to use the word "maliciously" in the declaration. It is sufficient if words of equivalent power or import are used. *White* v. *Nichols*, 266.
2. Every publication, either by writing, printing, or pictures, which charges upon, or imputes to, any person that which renders him liable to punishment, or which is calculated to make him infamous, or odious, or ridiculous, is *prima facie* a libel, and implies malice in the author and publisher towards the person concerning whom such publication is made. *Ib.*
3. Proof of malice cannot, in these cases, be required of the party complaining, beyond the proof of the publication itself; justification, excuse, or extenuation, if either can be shown, must proceed from the defendant. *Ib.*
4. Privileged communications are an exception; and the rule of evidence, as to such cases, is so far changed as to require of the plaintiff to bring home to the defendant the existence of malice as the true motive of his conduct.

   Privileged communications are of four kinds:

   1. Wherever the author and publisher of the alleged slander acted in the *bona fide* discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests.

   2. Any thing said or written by a master in giving the character of a servant who has been in his employment.

   3. Words used in the course of a legal or judicial proceeding, however hard they may bear upon the party of whom they are used.

   4. Publications duly made in the ordinary mode of Parliamentary proceedings, as a petition printed and delivered to the members of a committee appointed by the House of Commons to hear and examine grievances. *Ib.*
5. But in these cases the only effect of the change of the rule is to remove the usual presumption of malice. It then becomes incumbent on the party complaining to show malice, either by the construction of the spoken or written matter, or by facts and circumstances connected with that matter, or with the situation of the parties, adequate to authorize the conclusion. *Ib.*
6. Proof of express malice, so given, will render the publication, petition, or proceeding, libellous. Falsehood and the absence of probable cause will amount to proof of malice. *Ib.*
7. The jury being the tribunal to determine whether this malice did or did not mark the publication, the alleged libel should be submitted to them, and the court below erred in withholding it. *Ib.*

LIMITATIONS.
1. Where there has been a tenancy in common, if the tenants in possession only claim the undivided interest which was held by their immediate grantors, it is not adverse to the remaining part of the title, and such persons cannot avail themselves of the Statute of Limitations. *Clymer's Lessee* v. *Dawkins*, 674.
2. But if the occupants entered into possession and held the lands for more than twenty years before the commencement of the suit, by a purchase and claim thereof in entirety and severalty, and not an undivided part thereof, in co-tenancy, it is an adverse possession, and the Statute of Limitations is a good plea. *Ib.*

LOCAL LAW.
1. The mere construction of a will by a state court, does not, as the construction of a statute of the state, constitute a rule of decision for the courts of the United States. If such construction by a state court had been long acquiesced in, so as to become a rule of property, this court would follow it. *Lane et al.* v. *Vick et al.*, 464.

MAISON ROUGE.
1. The certificate of survey alleged to have been given by Trudeau, on the 14th of June, 1797, and brought forward to sustain a grant to the Marquis de Maison Rouge, declared to be ante-dated and fraudulent. *United States* v. *King et al.*, 773.
2. Leaving the certificate out of the case, the instruments executed by the Baron de Carondelet in 1795 and 1797, have not the aid of any authentic survey to ascertain and fix the limits of the land and to determine its location. *Ib.*

MANDAMUS.
1. Where a party has resorted to, and obtained a mandamus, he cannot afterwards proceed in another suit for the same cause of action. *Kendall* v. *Stokes et al.*, 87.

MARINE CORPS.
1. A brevet field-officer of the marine corps is not entitled by law to brevet pay and rations, by reason of his commanding a separate post or station, if the force under his command would not entitle a brevet field-officer of infantry of a similar grade to brevet pay and rations. *United States* v. *Freeman*, 556.
2. The act of 1834, chap. 132, does not repeal the 1st section of the act of 1818, regulating the pay and emoluments of brevet officers. *Ib.*
3. The 5th section of the act of 30th June, 1834, is a repeal of the joint resolution of the two houses of Congress of the 25th May, 1832, respecting the pay and emoluments of the marine corps. *Ib.*
4. By force of the army regulation No. 1125, authorizing the issues of double rations to officers commanding departments, posts, and arsenals, a brevet field-officer of marines is entitled to double rations. But the fact must be shown that he had such a command of a post or arsenal at which double rations had been allowed according to the army regulations. *Ib.*
5. The fact of appropriations having been made by Congress for double rations does not determine what officers are entitled to them. *Ib.*
6. A brevet field-officer of the marine corps, commanding a separate post, without a command equal to his brevet rank, is not entitled to brevet pay and emoluments. But if such brevet officer is a captain in the line of his corps, and in the actual command of a company, whether he is in the command of a post or not, he is entitled to the compensation given by the 2d section of the act of the 2d March, 1827. *Ib.*

MARSHAL.
1. A marshal is not authorized by law to receive any thing, in discharge of an execution, but gold and silver, unless the plaintiff authorizes him to receive something else. *McFarland* v. *Gwin*, 717.
2. The case of *Griffin et al.* v. *Thompson*, 2 How., 244, reviewed and confirmed. *Ib.*
3. A marshal, like a sheriff, is bound, after the expiration of his term of office, to complete an execution which has come to his hands during his term; and an execution is never completed until the money is made and paid over to the plaintiff, if it is practicable to make it. *Ib.*

ORLEANS TERRITORY.

1. The act of February 20th, 1811, authorizing the people of the territory of Orleans to form a constitution and state government, contained, in the third section thereof, two provisos; one in the nature of instructions how the constitution was to be formed, and the other reserving to the United States the property in the public lands, their exemption from state taxation, and the common right to navigate the Mississippi. *Permoli* v. *First Municipality*, 589.
2. The first of these provisos was fully satisfied by the act of 1812, admitting Louisiana into the union, "on an equal footing with the original states." The conditions and terms referred to in the act of admission referred solely to the second proviso, involving rights of property and navigation. *Ib.*
3. The act of 1805, ch. 83, extending to the inhabitants of the Orleans territory, the rights, privileges and advantages secured to the North Western territory by the ordinance of 1787, had no further force after the adoption of the state constitution of Louisiana, than other acts of Congress, organizing the territorial government, and standing in connection with the ordinance. They are none of them in force unless they were adopted by the state constitution. *Ib.*

PLEAS AND PLEADING.

See LIBEL.

PRACTICE.

1. There was a judgment against an administrator of assets *quando acciderint.*
2. Upon this judgment a *scire facias* was issued, containing an averment that goods, chattels, and assets had come to the hands of the defendant.
3. Upon this *scire facias* there was a judgment by default; execution was issued, and returned "*nulla bona.*"
4. A *scire facias* was then accorded against the administrator to show cause why the plaintiff should not have execution "*de bonis propriis.*"
5. It was then too late to plead that the averment in the first *scire facias* did not state that assets had come into the hands of the administrator subsequent to the judgment *quando*. *Dickson* v. *Williamson*, 57.
6. A judgment by default against an executor or administrator is an admission of assets to the extent charged in the proceeding against him. *Ib.*
7. If a party fail to plead matter in bar to the original action, and judgment pass against him, he cannot afterwards plead it in another action founded on that judgment; nor in a *scire facias*. *Ib.*
8. A demurrer reaches no further back than the proceedings remain in *fieri*, or under the control of the court. *Ib.*
9. Before a case can be dismissed under the 21st rule, regulating equity practice, there must exist, in the technical sense, a plea or demurrer on the part of the defendant, which the plaintiff shall not have replied to or set down for hearing before the second term of the court after filing the same. *Poultney et al.* v *City of Lafayette et al.*, 81.
10. The complainant, if he chooses, may go to the hearing, on bill and answer. *Ib.*
11. After a reference, an award, and the reception of the money awarded, another suit cannot be maintained on the original cause of action, upon the ground that the party had not proved, before the referee, all the damages he had sustained, or that his damage exceeded the amount which the arbitrator awarded. *Kendall* v. *Stokes*, 87.
12. Where a party has a choice of remedies for a wrong done, selects one, proceeds to judgment, and reaps the fruits of his judgment, he cannot afterwards proceed in another suit for the same cause of action. *Ib.*
13. This is especially true where the party has resorted to a mandamus, because it is not issued where the law affords a party any other adequate mode of redress. To allow him to maintain another suit for the same cause of action would be inconsistent with the decision of the court which awards the mandamus. *Ib.*
14. An application for a writ of error, prayed for without the authority of the party concerned, but at the request of his friends, cannot be granted. *Ex parte Dorr*, 103.
15. The objection of multifariousness can be taken by a party to the bill only

PRACTICE—(*Continued.*)
by demurrer, or plea, or answer, and cannot be taken at the hearing of the cause. But the court itself may take the objection at any time—at the hearing or otherwise. The objection cannot be taken by a party in the appellate court. *Oliver* v. *Piatt*, 333.
16. Where exceptions are taken to a master's report, it is not necessary for the court formally to allow or disallow them on the record. It will be sufficient if it appears from the record, that all of them have been considered by the court, and allowed or disallowed, and the report reformed accordingly. *Ib.*
17. After a case has been decided upon its merits, and remanded to the court below, if it is again brought up on a second appeal, it is then too late to allege that the court had not jurisdiction to try the first appeal. *Washington Bridge Co.* v. *Stewart*, 413.
18. The Supreme Court has no power to review its decisions, whether in a case at law or in equity. A final decree in chancery is as conclusive as a judgment at law. *Ib.*
19. An affirmance by a divided court, either upon a writ of error or appeal, is conclusive upon the rights of the parties. *Ib.*
20. Where the court below awarded a supersedeas to stay execution, but afterwards revoked that order on account of the insufficiency of the security, the Supreme Court will not interfere by granting a supersedeas. *Black* v. *Zacharie*, 453.
21. Nor will it interfere on account of the bankruptcy of the defendant, because the assignee of the bankrupt has his remedy in the Circuit Court. *Ib.*
22. Where a general objection is made, in the court below, to the reception of testimony, without stating the grounds of the objection, this court considers it as vague and nugatory; nor ought it to have been tolerated in the court below. *Camden* v. *Doremus*, 515.
23. If the citation be signed by the clerk, and not by a judge of the Circuit Court, or a justice of the Supreme Court, the case will, on motion, be dismissed. *The United States* v. *Hodge*, 534.
24. The 38th rule of court forbids the insertion of the whole of the charge of the court to the jury in a general bill of exceptions, but requires that the part excepted to shall be specifically set out. *Stimpson* v. *West Chester Railroad Company*, 553.
25. This court has not the power to correct any errors or omissions which may have been made in the Circuit Court in framing the exception; nor can it regard any part of the charge as the subject-matter of revision, unless the judges, or one of them, certify under his seal, that it was excepted to at the trial. *Ib.*
26. If the omission of a part of the charge, which was in fact embraced in the exception, is a mere clerical error, the party will be entitled to a *certiorari*, upon producing a copy of the exception, properly certified. *Ib.*
27. But in no case can the exception certified under the seals of the judges of the Circuit Court be altered or amended. *Ib.*
28. Where this court has affirmed the title to lands in Florida, and referred, in its decree, to a particular survey, it would not be proper for the court below to open the case for a re-hearing, for the purpose of adopting another survey. *Chaires* v. *United States*, 611.
29. The court below can only execute the mandate of this court. It has no authority to disturb the decree, and can only settle what remains to be done. *Ib.*
30. A court is not bound to give instructions to the jury in the terms required by either party; it is sufficient if so much thereof are given as are applicable to the evidence before the jury, and the merits of the case as presented by the parties. *Clymer's Lessee* v. *Dawkins*, 674.
31. When an issue is directed by a court of chancery, to be tried by a court of law, and in the course of the trial at law, questions are raised and bills of exceptions taken, these questions must be brought to the notice and decision of the court of chancery which sends the issue. *Brockett* v. *Brockett*, 691.
32. If this is not done, the objections cannot be taken in an appellate court of chancery *Ib*

PRACTICE—(*Continued.*)
33. If the chancery court below refers matters of account to a master, his report cannot be objected to in the appellate court, unless exceptions to it have been filed in the court below in the manner pointed out in the 73d chancery rule of this court. *Ib.*
34. Where a cause has been pending in this court for two terms, a writ of *certiorari* sent down at the instance of the defendant in error, to complete the record, and the defendant in error then moves to dismiss the case upon the ground that the clerk of a state court issued the writ of error, and one of the judges of that court signed the citation, the motion comes too late. *McDonogh* v. *Millaudon*, 693.
35. Where the matter in dispute is below the amount necessary to give jurisdiction to this court, the writ of error must be dismissed, on motion. *Winston* v. *The United States*, 771.
36. Where a bill was filed on the equity side of the court below, to enjoin the marshal from levying an execution upon certain property, which execution was for a less sum than two thousand dollars, an appeal from a decree dismissing the bill will not lie to this court, although the entire value of the property may be more than two thousand dollars. *Ross* v. *Prentiss*, 771.
37. The jurisdiction of the court does not depend upon the amount of any contingent loss or damage which one of the parties may sustain by a decision against him, but upon the amount in dispute between them. *Ib.*

PUBLIC LANDS.
See LANDS, PUBLIC.

QUESTIONS OF LAW AND FACT.
See COMMERCIAL LAW, 4; DUTIES, 4.

RECEIVER OF PUBLIC MONEY.
The felonious taking and carrying away the public moneys in the custody of a receiver of public moneys, without any fault or negligence on his part, does not discharge him and his sureties, and cannot be set up as a defence to an action on his official bond. *The United States* v. *Prescott*, 578.

REPEAL.
See COMPROMISE ACT, 1, 2; LEAD MINES, 4.

SHIPS AND SHIPPING.
1. An agreement of consortship between the masters of two vessels engaged in the business known by the name of wrecking, is a contract capable of being enforced in an admiralty court, against property or proceeds in the custody of the court. *Andrews* v. *Wall et al.*, 568.
2. The case of *Ramsay* v. *Allegre*, 12 Wheat., 611, commented on, and explained. *Ib.*
3. Such an agreement extends to the owners and crews, and is not merely personal between the masters. *Ib.*

STATUTES.
1. The court, in construing an act, will not consider the motives, or reasons, or opinions, expressed by individual members of Congress, in debate, but will look, if necessary, to the public history of the times in which it was passed. *Aldridge et al.* v. *Williams*, 9.
See CONSTRUCTION.
2. In affirmative statutes, such parts of the prior as may be incorporated into the subsequent statute, as consistent with it, must be considered in force. *Daviess* v. *Fairbairn*, 636.
3. If a subsequent statute be not repugnant in all its provisions to a prior one, yet if the later statute clearly intended to prescribe the only rules which should govern, it repeals the prior one. *Ib.*
4. Under the application of these rules, the law of Virginia, passed in 1776, authorizing the mayor of a city to take the acknowledgment of a feme covert to a deed, is not repealed by the act of 1785, or that of 1796. *Ib.*
5. Statutes *in pari materia* should be taken into consideration in construing a law. If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute. *United States* v. *Freeman*, 556.

STATUTES—(*Continued.*)
6. And if it can be gathered from a subsequent statute *in pari materia* what meaning the legislature attached to the words of a former statute, this will amount to a legislative declaration of its meaning, and will govern the construction of the first statute. *Ib.*
7. The meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed; the limitation of the rule being that to extend the meaning to any case, not included within the words, the case must be shown to come within the same reason upon which the law-maker proceeded, and not a like reason. *Ib.*

TAXATION.
1. When the purchaser of land from the United States has paid for it, and received a final certificate, it is taxable property, according to the statutes of Michigan, although a patent has not yet been issued. *Carroll* v. *Safford*, 441.
2. Taxation upon lands so held is not a violation of the ordinance of 1787, as an "interference with the primary disposition of the soil by Congress," nor is it "a tax on the lands of the United States." The state of Michigan could rightfully impose the tax. *Ib.*
3. It was competent for the state to assess and tax such lands at their full value, as the absolute property of the holder of the final certificate, and in default of payment, to sell them as if he owned them in fee. *Ib.*

TENANCY IN COMMON.
1. The entry and possession of one tenant in common is ordinarily deemed the entry and possession of all the tenants; and this presumption will prevail in favor of all, until some notorious act of ouster or adverse possession by the party so entering is brought home to the knowledge or notice of the others. When this occurs, the possession is from that period treated as adverse to the other tenants. *Clymer's Lessee* v. *Dawkins*, 674.
2. Such a notorious ouster or adverse possession may be by any overt act *in pais* of which the other tenants have due notice, or the assertion in any proceeding at law of a several and distinct claim or title. If an attempt be made to obtain a partition, although the legal proceedings by which it is effected may be invalid or defective, still, being a matter of public notoriety, the co-tenant is bound at his peril to take notice of the claim to adverse possession thus set up. *Ib.*
3. If the tenants in possession only claim the undivided interest which was held by their immediate grantors, it is not adverse to the remaining part of the title, and such persons cannot defend themselves in ejectment by giving in evidence an outstanding title elder than that under which they claim; nor can they avail themselves of the Statute of Limitations. *Ib.*
4. But if the occupants entered into possession and held the lands for more than twenty years before the commencement of the suit, by a purchase and claim thereof in entirety and severalty, and not an undivided part thereof in co-tenancy, it is an adverse possession, and the Statute of Limitations is a good plea. *Ib.*

TOLLS.
See CONSTITUTIONAL LAW, 7–9.

TRUSTS.
1. In cases of trust, where the trustee has violated his trust by an illegal conversion of the trust property, the *cestui que trust* has a right to follow the property into whosesoever hands he may find it, not being a *bona fide* purchaser for a valuable consideration, without notice. *Oliver et al.* v. *Piatt*, 333.
2. Where a trustee has, in violation of his trust, invested the trust property or its proceeds in any other property, the *cestui que trust* has his option, either to hold the substituted property liable to the original trust, or to hold the trustee himself personally liable for the breach of the trust. *Ib.*
3. The option, however, belongs to the *cestui que trust* alone and is for his benefit, and not for the benefit of the trustee. *Ib.*
4. If the trustee, after such an unlawful conversion of the trust property should re-purchase it, the *cestui que trust* may, at his option, either

TRUSTS—(*Continued.*)
hold the original property subject to the trust, or take the substituted property in which it has been invested, in lieu thereof. And the trustee, in such a case, has no right to insist that the trust shall, upon the re-purchase, attach exclusively to the original trust property. *Ib.*
5. Where the trust property has been unlawfully invested, with other funds of the trustee, in other property, the latter, in the hands of the trustee, is chargeable *pro tanto* to the amount or value of the original property. *Ib.*
6. What constitutes notice of a trust? *Ib.*
7. An agent, employed by a trustee in the management of the trust property, and who thereby acquires a knowledge of the trust, is, if he afterwards becomes possessed of the trust property, bound by the trust, in the same manner as the trustee. *Ib.*

USURY.
See COMMERCIAL LAW, 1–4.

VENDOR AND PURCHASER.
1. A purchaser by a deed of quit claim without any covenant of warranty, is not entitled to protection in a court of equity as a purchaser for a valuable consideration, without notice; and he takes only what the vendor could lawfully convey. *Oliver* v. *Piatt*, 333.
2. A warranty, either lineal or collateral, is no bar to an heir who does not claim the property to which the warranty is attached by descent, but as a purchaser thereof. *Ib.*

WILLS.
See DEVISE.

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